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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DESHAWN LEE CAMPBELL, Defendant and Appellant.	H034690 (Santa Clara County Super. Ct. Nos. CC126494, C9946256)

INTRODUCTION

In case No. CC126494, defendant Deshawn Lee Campbell was convicted after jury trial of the 2001 murder of Jeffrey Fontana, a peace officer engaged in the performance of his duties, with the personal use of a firearm (Pen. Code, §§ 187, 12022.5, 12022.53),[1] and of being a felon in possession of a firearm (§ 12021, subd. (a)(1)). The jury further found true allegations that at the time of the offenses, defendant's release on bail had been revoked (§ 12022.1), and that he had a prior strike (§§ 667, subds. (b) – (i), 1170.12). The trial court sentenced defendant to prison for life without parole, consecutive to 25 years to life, consecutive to three years four months,

[1] All further unspecified statutory references are to the Penal Code.

consecutive to the five-year-four-month term imposed in unrelated case No. CC114103 and the 16-month term imposed in unrelated case No. C9946256 (the burglary case).

In case No. C9946256, defendant was convicted in 1999 by guilty plea of first degree burglary (§§ 459, 460, subd. (a)). He was originally granted probation, but was resentenced to prison following his conviction in the murder case for 16 months (one-third the middle term) with no presentence custody credit, consecutive to the terms imposed as stated above in unrelated case Nos. CC126494 (the murder case) and CC114103.

Defendant appeals from the judgment in the murder case and the resentencing in the burglary case. On appeal in the burglary case, defendant contends that he is entitled to 483 days of presentence custody credit.

On appeal in the murder case, defendant contends: (1) the court erred and violated his right to present a defense by (a) limiting evidence and argument about the behavioral implications of his developmental disabilities, (b) limiting evidence of his defense of third-party culpability, that is, his claim that Rodney McNary was the actual shooter, (c) refusing his requested pinpoint instruction on third-party culpability, (d) refusing to allow his counsel to comment on the prosecution's failure to call McNary to testify, and (e) cumulative error; (2) the court abused its discretion and violated his right to confrontation by admitting evidence of McNary's out-of-court self-exculpatory statements; (3) the court denied him a fair trial by admitting evidence of (a) uncharged offenses, and (b) other bad acts; (4) the prosecutor committed prejudicial misconduct by (a) appealing to the jury's sympathy for the victim, (b) misstating the law during closing argument, (c) disparaging defendant, (d) conduct that amounted to contempt of court, (e) improper questioning of defendant, (f) rude and intemperate behavior, and (g) disparaging defense counsel; (5) the court prejudicially erred by admitting irrelevant evidence of conduct by (a) his father and (b) a family friend; (6) the court prejudicially

erred by admitting multiple hearsay in a witness's police interview; and (7) cumulative error resulted in an unfair trial.

We will affirm the judgment in the murder case. However, in the burglary case we will order the abstract of judgment amended to include the grant of 483 days of presentence custody credit.

Defendant has also filed a petition for writ of habeas corpus and a supplemental petition, which we have ordered considered with the appeal. In the petitions defendant contends that the prosecutor allowed a witness's false testimony to go uncorrected and that trial counsel rendered ineffective assistance. We have disposed of the petitions by separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

BACKGROUND

I. The Burglary Case

In case No. C9946256, defendant pleaded guilty on December 13, 1999, to first degree burglary (§§ 459, 460, subd. (a)), and on April 25, 2000, he was placed on five years formal probation. His probation was revoked in 2001 and in January 2002, he was sentenced to serve a five-year term. In October 2002, he was resentenced to serve a 16-month term (one-third the middle term) consecutive to the term imposed in unrelated case No. CC114103, and was granted 483 days custody credit. He was resentenced in August 2009, following his conviction in the murder case, case No. CC126494, to serve a 16-month consecutive term (one-third the middle term) with no presentence custody credit.

II. The Murder Case

II. A. The Writ Proceeding

Defendant was charged in count one of an information filed February 15, 2002, in case No. CC126494 with the first degree murder of Jeffrey Fontana (§ 187), with special circumstances making defendant eligible for the death penalty. On June 26, 2006, defendant filed a motion for a "mental retardation hearing" pursuant to *Atkins v. Virginia* (2002) 536 U.S. 304, and section 1376. The hearing was held over 55 days between

February 2007 and July 2007. (*Campbell v. Superior Court* (2008) 159 Cal.App.4th 635, 640.) On August 17, 2007, the trial court issued an order finding that defendant is not mentally retarded. (*Id*. at p. 641.) Defendant filed a petition for writ of mandate and/or prohibition in this court contending that the trial court's order was an abuse of discretion. (*Id*. at p. 644.) On October 24, 2007, defendant filed a motion in the trial court to reopen the mental retardation hearing or, alternatively, for a new hearing based on newly discovered evidence. On November 1, 2007, the trial court denied the motion. Defendant filed a motion for leave to file a supplemental petition for writ of mandate and/or prohibition. (*Id.* at p. 645.) This court granted defendant leave to file the supplemental petition and issued a *Palma* notice.[2] On January 30, 2008, this court issued a peremptory writ directing the trial court to vacate its August 17, 2007 order and its November 1, 2007 order, and to reopen the mental retardation hearing. (*Id*. at p. 653.) On December 19, 2008, following reopened proceedings, the trial court filed an order finding that defendant is mentally retarded, making defendant no longer eligible for the death penalty.

II. B. The Amended Information

On January 5, 2009, an amended information was filed charging defendant with the murder of Fontana (§ 187; count 1) and with possession of a firearm by a felon (§ 12021, subd. (a)(1); count 2). As to count 1, the information further alleged that Fontana was a peace officer engaged in the performance of his duties (§ 190.2, subd. (a)(7)), that defendant committed the offense for the purpose of avoiding a lawful arrest (§ 190.2, subd. (a)(5)), and that defendant personally and intentionally discharged a firearm during the commission of the offense (§§ 12022.53, subd. (d), 12022.5, subd. (a)). The information also alleged that defendant had a prior strike (§§ 667, subds. (b) –

[2] *Palma v. U.S. Industrial Fasteners, Inc*. (1984) 36 Cal.3d 171, 180.

(i), 1170.12), and that his release on bail had been revoked at the time of the offenses (§ 12022.1). During jury voir dire, defendant stipulated that he had suffered a felony conviction prior to October 28, 2001.

II. C. In Limine Motions

II. C. 1. Expert Testimony on Mental Retardation

Prior to trial, defense counsel "concede[d]" to the People's "request to exclude . . . the expert testimony involving mental retardation with the People's agreement that [they] will not be seeking . . . jury instructions on a first-degree murder [theory]." Defense counsel stated that "the concession, then, at this time is just we're not presenting diminished actuality and, of course, that expert testimony that would support that." "This would only be really subject to an issue that I could see coming up, hypothetically, if the defendant . . . chose to testify and if, based on that testimony, hypothetically, the Court saw that there was enough evidence to instruct the jury on voluntary manslaughter for some theory that would be presented through his testimony. Then I could see us needing to revisit this issue."

II. C. 2. Uncharged Offense Evidence

Prior to trial, the prosecutor sought leave to introduce under Evidence Code section 1101, evidence of three incidents involving prior uncharged offenses by defendant, in addition to evidence that defendant had outstanding bench warrants at the time of Officer Fontana's shooting. The parties characterize the three uncharged offense incidents at issue as the moped incident, the Kepler incident, and the Good Guys incident. Defendant contended that the evidence of the three incidents was inadmissible under Evidence Code sections 1101 and 352. The trial court ruled that all the proffered evidence was admissible. The jury subsequently heard the following testimony.

Officer Vince Alvarez testified that on October 1, 2000, he stopped defendant for riding a minibike without a helmet in violation of Vehicle Code section 27803, subdivision (b). Defendant did not stop right away and the officer had to force him to the

side of the road. During a subsequent pat-search of defendant for weapons, the officer felt a large lump in defendant's left pants pocket. Defendant gave the officer permission to reach inside the pocket. When the officer did so, he felt a hard plastic card and some plastic bags. As the officer pulled the items out of defendant's pocket, defendant pushed his body onto the officer and attempted to grab the items out of the officer's hand. When the officer pushed defendant away, defendant took off running. The officer realized that he had defendant's ID, some cash, and five baggies of what appeared to be marijuana. The officer chased defendant for a short distance, but then reported the incident to communications. He learned that defendant was on probation for fraud and burglary. Defendant's father later phoned the police to say that defendant would turn himself in. The officer went to defendant's residence and arrested him for possession of marijuana for sale and resisting arrest.

Gerald Kepler, a now-retired San Jose police officer, testified that late on the night of September 9, 2001, when he was off-duty, his neighbor woke him and informed him that some men were trying to get into a pickup truck parked in Kepler's driveway. Kepler went outside in his robe and approached two young men walking down the street who he did not know, one of whom was defendant. The two men were already in a confrontation with Kepler's neighbors. Kepler asked the men if he could speak to them. Their conversation lasted "off and on" for about three or four minutes, during which time defendant became agitated and aggressive. He appeared to be under the influence and Kepler could smell alcohol on his breath. Kepler decided to place defendant under arrest for creating a disturbance, being drunk in public, "and to avoid a fight between him and one of my neighbors." Kepler tried to take defendant's left arm and place him in a control hold. Defendant kicked Kepler's right leg out from under him. As Kepler fell to the ground, he grabbed defendant's jacket. Defendant spun away and struck Kepler on the back of the head with a flashlight. Defendant and the other man with him ran away. Kepler had to go to the emergency room and to have three stitches in the back of his

head. His pickup truck had not been damaged. Over a month later, Kepler saw police flyers regarding Officer Fontana's shooting, and he realized for the first time that the person in the flyers, defendant, was the person who had hit him with the flashlight.

Sergeant Neal Wilson testified that around 9:00 p.m. on June 22, 2001, he responded to a Good Guys store following the report of somebody trying to use a stolen credit card. When he arrived, he saw defendant walking around inside the store. He waited for another officer, Sergeant Paul Spagnoli, to arrive, and then the two of them entered the store. People inside the store pointed to defendant, who started walking away from the officers. Wilson told defendant that he needed to talk to him. Defendant asked the officers why they were "hassling" him, and refused Wilson's request to pat search him for weapons. When Spagnoli reached towards defendant, defendant ran. Wilson ran to the store's open front door. Defendant stopped about five feet in front of Wilson, then bent over slightly and ran into him "[s]quare on." The force caused both of them to fall down outside the store. Defendant screamed, kicked, and swung his arms. Wilson was hit a few times, but he managed to hold on to defendant. Defendant got to his feet but Spagnoli could not gain control of him, so Wilson forced defendant back down on the ground. Spagnoli went down with defendant and hit his head on the pavement. A third officer was finally able to handcuff defendant and bring him to his feet, but defendant continued to struggle. Other officers arrived and put defendant in a patrol car with the help of a leg-wrap restraint. As a result of the incident, Wilson sustained injuries to both his knees and to his left elbow, his glasses broke, and he lost three days of work.

Lieutenant Paul Spagnoli testified that on the evening of June 22, 2001, Sergeant Wilson was already at the Good Guys store when he arrived there. They went inside the store together. Some employees pointed to defendant, so the officers approached him. Wilson told defendant that they wanted to talk to him and to do a pat search. Defendant ran, and Spagnoli chased him. Defendant ran right towards Wilson, who was blocking the store's front door. Wilson grabbed defendant, and they both went to the ground.

Defendant violently struggled while the officers tried to take him into custody. When defendant stood up, Wilson forced him back down on the ground, which also caused Spagnoli to fall backwards and hit his head on the ground. Spagnoli felt tugging near his belt in the area of his gun holster at the same time that Wilson pulled defendant away. A third officer came to their assistance, and they were able to handcuff defendant. Defendant continued to kick, so a wrap restraint was placed around his legs when he was placed in the patrol car. Spagnoli was out of work the next day due to a slight headache as a result of the incident.

II. D. The Outstanding Bench Warrant Evidence

Evidence was also presented to the jury that, on July 9, 2001, defendant failed to appear in criminal court on forgery and theft charges, his bail was revoked, and a bench warrant issued. On July 26, 2001, the court issued a warrant for defendant's arrest in a separate burglary case. Defendant told a friend that he was facing three to five years in prison on his outstanding warrants. When the friend urged defendant to turn himself in, defendant said he "couldn't handle that. He didn't want to do that."

II. E. The Prosecution's Trial Evidence Regarding the Murder

On the night of October 27, 2001, defendant attended a large party at a house on Rotterdam Lane with several friends. Defendant and Rashaan Yarber were driven to the party by Rodney McNary in a black Mustang owned by McNary's girlfriend Janielle Carter. During the party, defendant and many others were involved in a fight in the backyard of the house. Ryan Palenske was in the street outside the house, leaning into Robert Cunningham's car and talking to Cunningham, when people from the party spilled out into the street. McNary, defendant, and Yarber got into the Mustang. McNary drove away, hitting Cunningham's car and Palenske with the Mustang as he was leaving. People threw rocks and bottles at the Mustang, and gunshots were fired. Cunningham followed the Mustang and Cunningham's passenger was able to write down its license plate number.

Cunningham saw the Mustang turn onto Porto Alegre before he ended his chase of it and headed home. The Mustang stopped near the Calle Almaden cul-de-sac off of Porto Alegre and defendant, McNary, and Yarber fled. Yarber and defendant ran to Tyree Washington's apartment on Coleman Road near Almaden Expressway. McNary ran in a different direction.

Yarber and defendant arrived at Washington's apartment out of breath. Defendant told people there that some people at the party had jumped him and hit him, so he ran. Defendant said that he was going to go back to the party with a gun and retaliate. Deon Watts drove defendant home around 3:30 or 4:00 a.m.

Carter, McNary's girlfriend, received calls from defendant, Washington, and Watts in the early morning hours of October 28, 2001. All of them were looking for McNary. Defendant told Carter that her Mustang had been damaged and that he was going to go back to the Mustang to "pop the ignition" so that it would appear to have been stolen.[3]

Officers Mario Recinos and Jeffrey Fontana responded with other officers to a disturbance call on Rotterdam Lane around 2:16 a.m. on October 28, 2001. They cleared the call at 4:15 a.m. and went separate ways. Fontana sent a text message to Recinos stating that he was going to continue cruising the area. Several people who lived on Calle Almaden at the time testified that they heard a gunshot and the footsteps of one person run up the street. When they saw an officer lying in the street, they called 911. Recinos received the dispatch report that an officer was down on Calle Almaden and he was the first officer to arrive at the location at approximately 4:39 a.m. Fontana's patrol car was parked at the end of the cul-de-sac with its door open, its engine running, its front

[3] Carter was convicted by plea in 2003 of being an accessory, a felony, and at the time she entered her plea it was agreed that her sentencing would be delayed until the conclusion of this case.

red and blue lights on, its rear amber light flashing, and its spotlight on. Fontana was lying in the street, face up, about 15 feet from a tan Hyundai that was parked in a driveway in front of Fontana's patrol car. Fontana's feet were pointed towards the Hyundai, there was a pool of blood near his head, and his duty weapon holster was buttoned. His flashlight was in the gutter. He had a gunshot wound above his right eye and gunpowder stippling on his face indicating that he had been shot from close range. A .45-caliber shell casing was found at the scene. The doors of the Hyundai were closed, and the patrol car's spotlight was directed just to the left of the Hyundai, as if it were directed on somebody standing outside the driver's door. Recinos attempted to find Fontana's pulse, but there was no pulse.

The keys to the Hyundai were in the ignition and the hood was warm but the engine was off. All doors other than the driver's door were locked, the driver's window was about halfway down, and there were clothing items on the front and rear passenger seats. The car was registered to defendant's father, Robert Campbell. An ATM card bearing defendant's name was found under the driver's seat and a bill and receipt in defendant's name were found in the glove box. One of the residents of Calle Almaden told an officer that he had seen the Hyundai about one month before, stopped at a light at the intersection of Almaden Expressway and Blossom Hill Road. At that time, he had seen "something happening" that caused him to write down the car's license plate number and report it to the police. Defendant was sitting in the right rear passenger seat of the Hyundai during this previous incident.

Officers swabbed the steering wheel of the Hyundai with a gauze pad and exposed the gauze pad to a trained bloodhound. The dog followed the scent to a hillside pasture near Coleman Road and Almaden Expressway where there was a herd of llamas, and then lost the scent.

A black Mustang was located parked on Via Almaden, which is a short cul-de-sac opposite Calle Almaden. The parties stipulated that the distance from the Hyundai to the

Mustang was 175 yards. The Mustang had side body damage, as if it had been involved in a collision. The parties stipulated that "the Hyundai . . . was analyzed, and fingerprints were lifted from it. And those fingerprints came back to Deshawn Campbell. There [were] no prints coming back to Rodney McNary. [¶] As to the Mustang, there were fingerprints on there that came back to Rodney McNary. Further, there was a DNA that was associated with a cigarette or cigar, and the DNA came back to Rodney McNary. There were no prints of Deshawn Campbell in the Mustang." No gunshot residue was found inside the Hyundai, indicating that a gun was not fired from inside the car. When the Hyundai was inspected in December 2001, it had a small crack in its windshield, one bulb in a rear taillight was burned out, and its two front tires were worn down to their steel belts. In addition, the car emitted grayish-white smoke from its exhaust pipe while being driven. Each of these things constituted a Vehicle Code violation which could cause an officer to stop the car.

Defendant went to Washington's apartment a second time on the morning of October 28, 2001. This second time, he was out of breath, and he asked to use the phone. Washington asked defendant what was going on and defendant said, "it's nasty, it's real ugly." Washington gave defendant a phone and defendant made three or four calls.[4] In one conversation, which Washington thought was with defendant's father, defendant said something like, "clean up the house." A call was made from Washington's phone to defendant's father at 4:36 a.m., and another call was placed from Washington's phone to defendant's brother's girlfriend at 4:38 a.m. Defendant also called Marcell Quincy Gilbert at 4:46 a.m., and gave him directions to Washington's apartment. When Gilbert arrived at Washington's apartment to give defendant a ride, he asked defendant, "What's

[4] Washington testified that he pleaded guilty to being an accessory to a felony in violation of section 32, and that the court reduced the charge to a misdemeanor at the time of sentencing.

going on?" Defendant replied, "It's all bad." Defendant climbed into the open bed of Gilbert's pickup truck and lay down. Gilbert took defendant to Gilbert's home, gave defendant his cell phone, and went to bed. Defendant left later that day.

Around 4:45 a.m. on October 28, 2001, San Jose Police Officer John Barg was assigned to aid in preventing all traffic from entering the neighborhood where Officer Fontana had been shot. Barg was stationed at the intersection of Almaden and McAbee, and all he knew was that there was an officer "down." He did not know about the Rotterdam Lane party. Around 5:30 a.m., a man who identified himself as Rodney McNary approached Barg on a bicycle. McNary was sweating and appeared nervous. Barg detained him and searched him. McNary was released after Barg notified his supervisor, the supervisor spoke to McNary, and Barg filled out a field identification card.

Several officers went to defendant's father's home beginning around 5:55 a.m. on October 28, 2001. After contacting defendant's father about one-half hour later, and asking him about his cars, defendant's father said that he had recently sold his Hyundai to an individual walking down the street. He could not give any other information about the sale, however. The home was searched later that day. One of the keys from the key ring in the Hyundai's ignition fit the lock to a bedroom in which indicia of defendant's residency was found. A forensic expert determined that a .45-caliber bullet found in defendant's father's bedroom had been ejected but not fired from a gun, and that distinctive ejection markings and a stamp on that bullet were identical to markings on the .45-caliber casing found near Officer Fontana's body. Defendant's father later admitted that he had lied to the officers about selling the Hyundai.

Around 4:30 p.m. on October 28, 2001, officers found McNary at an address on Gettysburg. McNary told Officer Rob Imobersteg that he had gone to the Rotterdam Lane party with Campbell, that they fled the party in a vehicle after a fight broke out, and that they later abandoned the vehicle. He also said that he hid in a creek and that he was

later stopped by the officer on Almaden. He agreed to an interview at the police station. During that interview, McNary denied having been involved in the shooting of Officer Fontana.[5] McNary was interviewed by the police again a couple years later. During that interview, McNary "emphatically denied" that he had shot Officer Fontana.

When interviewed by officers on October 28, 2001, Carter initially lied about the location of her Mustang; she said that it had been stolen. When officers allowed McNary and Carter to talk with each other in an interview room at the police station, McNary told Carter that the police were "trying to put the shooting on him." He told her to tell the officers the truth. Carter then told the police that McNary had borrowed her Mustang the night before.

At approximately 5:03 p.m. on October 28, 2001, an officer interviewed Rueben Martinez, a neighbor of the Campbell family. Martinez was sober and cooperative. He told the officer that he had seen defendant drive a tan Hyundai, but he had never seen defendant with a gun. He had heard defendant's father yelling at defendant about one month earlier, telling defendant that he wanted his gun back. Martinez had "negative things to say about activity involving the Campbells at the Campbell residence," and he described defendant as a "hothead."

Defendant went to the homes of several of his friends asking for help after Officer Fontana's death. Defendant seemed afraid or worried when he arrived at Kira McCuien's home with another man McCuien did not know on October 28, 2001. Defendant asked McCuien and Janee Gilmore for a ride somewhere. Gilmore could not give defendant a ride and McCuien declined to do so because she had seen defendant's picture "all over the news." Gilmore testified that a month or two after Officer Fontana's death, McNary confessed to her that he did the shooting. However, she did not want to tell anybody

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[5] An audio recording of the interview was played for the jury.

about the confession, or testify about it, because McNary threatened her and people she cares about, and she was afraid of him and his "people." She was testifying about the confession only because, if she did not do so, "you guys would put me in jail."

Defendant was driven to Sebastian Cadena's home around 9:30 or 10:00 p.m. on October 28, 2001. Defendant asked Cadena if he had heard anything about him. Cadena said no, and invited defendant inside. Defendant asked Cadena if he could stay the night, but Cadena told him no. Defendant had Cadena look up on a computer information about the killing of a San Jose police officer. After reading the article, defendant said, "it was me," "it was me, who did it." Defendant started crying and asked Cadena to hide him. When Cadena said he could not do so, defendant gave him some phone numbers to call. Cadena called two of the numbers. Defendant soon left with the unknown person who had brought him.

Defendant went to Priscilla Smith's house on October 31, 2001, and stayed there a few days. Defendant told her that he had got into some trouble at a party, some guys were chasing him, and that is when he got pulled over. Although Smith knew that Campbell was wanted for questioning in the shooting of a police officer, she did not turn defendant in because she was afraid she would get into trouble. She asked defendant what he was going to do and he said, "I don't know."

Smith argued with her boyfriend Clarence Sheppard about defendant being at her home, but she told Sheppard that defendant could stay. Sheppard talked to defendant, and defendant said, "I know, I know I messed up." Sheppard asked defendant, "what the hell were you thinking?" Defendant shook his head, "[l]ike he doesn't know." Sheppard told defendant that he had to leave. Defendant gave Sheppard a letter to give to his parents, but Sheppard did not give the letter to them. He eventually gave the letter to the police.[6]

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[6] The letter is not in the record on appeal.

Louella Kissoon and her brother Gerald Kissoon talked with defendant at Smith's home a few days after Officer Fontana's death. Defendant asked Louella if she had heard what happened. She asked defendant if he knew he had made a mistake. Defendant responded, "I know," "I fucked up." Louella asked defendant if he knew he had killed a police officer. He responded, "I know." She asked defendant why he shot the officer and he said, "I panicked and—you know, I have all these warrants and I just fucked up." Louella told defendant that he could not hide forever, and he responded, "I know, I know." When Gerald first saw defendant at Smith's house, he got scared. Gerald asked defendant, "did you do it?" Defendant responded, "yeah, yeah." Defendant asked Gerald to help him. Defendant had a .45-caliber gun that Gerald took and then dismantled and destroyed at his parent's home. Smith and Luella drove defendant to another person's house; defendant spent the drive in the trunk of the car.

Defendant was arrested on November 7, 2001. Defendant had a telephone conversation from jail with one of his brothers on November 15, 2001. In that conversation, defendant's brother told defendant that he was with McNary, who was "hiding out," and that he had asked McNary "why you hiding out . . . trying to skip town? If you didn't do nothing, if you had nothing to do with this?" Defendant responded to his brother's statement by saying, "Because. He ran someone over at that party, that, that [he] is scared of. And he hit a car." Defendant's brother responded, "Still though . . . I think he's trying to keep hisself out of this and everybody else take their cases and their charges and his rap, no. Fuck that."

II. F. The Defense Evidence Regarding the Murder

Lacey Ortez had known defendant and his family for about 16 years by the time of defendant's trial. She had also known Carter for a number of years, and knew McNary through Carter. A day or two after an officer was killed in October 2001, McNary came to her house. Ortez left the room, but she heard her now deceased husband and McNary talking. McNary said, "9-1-1 was shot. 187. 9-1-1. I didn't mean to do it." McNary

sounded scared. He asked if he could stay there until "everything blows over." Ortez's husband then left with McNary. Within a week, Ortez and her husband moved because she was afraid that McNary "was going to come and get us." She also believed that she was in danger for testifying.[7]

David Jackson, who admitted that he had two 2008 felony convictions and who was in custody at the time of his testimony, testified that he grew up with defendant. In late October or early November 2001, Jackson was talking with McNary outside a restaurant while Carter was sitting in a minivan nearby with two other men. McNary brought up the subject of the shooting of a police officer. McNary twice said that defendant did not do it. McNary then robbed Jackson; he pulled out a gun, placed it next to Jackson's rib cage, and told Jackson to give him everything he had. The two men in the minivan jumped out of it and also pulled guns on Jackson. Jackson gave McNary a couple hundred dollars, some gold jewelry, his driver's license, his red shirt, and his red shoes. After McNary left, Jackson reported the robbery to the police, but he did not say that the robber was McNary, because McNary had his driver's license and therefore knew where he and his family lived.

Defendant testified in his own defense. He testified that he was 30 years old and that he had one child, a daughter named Tavia. He admitted having a 1999 conviction for residential burglary, and 2002 convictions for battery on a peace officer causing injury, three counts of resisting a police officer, using and attempting to use a counterfeit access card, possessing a forged license, second-degree robbery, and petty theft with a prior. He further testified that it was McNary who shot Officer Fontana, not he.

[7] The parties later stipulated that between 1989 and 2005, McNary suffered various felony and misdemeanor convictions, including for assault with a deadly weapon, assault by means likely to produce great bodily injury, infliction of corporal injury on a cohabitant, and possession of a firearm by a felon.

Defendant testified that when he told Carter over the phone on the morning of the shooting that her car had been damaged, she became upset. She asked defendant to meet McNary at the Mustang. Defendant grabbed a gun from his father's closet for protection and left in his father's car. When he found the Mustang, he drove down the opposite street and parked in somebody's driveway. McNary ran up to his car and they started talking. When another car approached and parked behind defendant's car, McNary thought it was somebody from the party, so he asked for defendant's gun. Defendant gave the gun to McNary. The car's blue and red lights turned on, and an officer got out of the car and approached them. The officer asked them their names and what they were doing. McNary shot the officer. Defendant panicked and got out of the car. McNary gave him back the gun and told him to get rid of it, and then they both ran.

Defendant ran to Washington's apartment, where he called his father, brothers, and Gilbert. Gilbert picked defendant up and took him to Gilbert's house. Defendant did not tell anybody what had happened. Defendant's cousin Sharon Baker picked him up later and took him to his brother's home in East Palo Alto. Baker told defendant that she saw the police at his house and she asked him why. He told her that an officer had been shot and that somebody he knows did it. Defendant told his brother that McNary had shot the officer. Baker took defendant to a friend's house in San Jose. Another friend, "E.," took defendant to McCuien's house, and then to defendant's friend Kamal's house. Kamal took defendant to Cadena's house. Defendant did not tell any of these people who shot the officer.

Later, defendant went to and stayed at Priscilla Smith's home for a number of days. There, he heard news reports stating that the police were looking for him. He did not turn himself in because he did not want to be labeled as a "snitch." He was also afraid that people associated with McNary would hurt his family. He gave the gun to Gerald Kissoon to destroy because he was afraid that if he had it on him when he was arrested, and officers saw it, they might shoot him. When he left Smith's home, he went

to another friend's home. He told his friend that he did not shoot the officer. He stayed in a shed there until the police arrested him. After his arrest, when he talked to his brother on the telephone, he did not say that McNary had killed the officer because he knew that the conversation was being recorded and he did not want to "put it out there."

Dr. Stephen Greenspan, a psychologist, testified as an expert in the field of mental retardation. In the United States, the criteria for mental retardation are significant deficits in intellectual functioning, associated deficits in adaptive functioning or adaptive behavior, and onset before the age of 18. After reviewing the reports of other experts, various records made available to him, and his own interview and evaluation of defendant, Dr. Greenspan concluded that defendant qualifies for a diagnosis of mild mental retardation. He estimates that defendant has a mental age of between 10 and 12 years old, and an academic level of between the fifth and the seventh grade. Poor social judgment is one of the defining characteristics of people with mild mental retardation as is gullibility, or the lack of awareness of when they are being swindled or taken advantage of. A person with mental retardation can also have an antisocial personality disorder, but it is more likely that defendant has an anxiety disorder rather than an antisocial personality disorder.

Mark Harrison, a licensed private investigator, testified as an expert on African-American criminal street gangs. In Harrison's opinion, based on photographs, contents of a notebook seized from Carter's residence, McNary's tattoos, and his "central file," McNary is an active member of the Seven Trees Crip criminal street gang. The primary activities of the Seven Trees Crip gang are street-level distribution of controlled substances, shootings, robberies, homicides, and witness intimidation. Given the nature of the gang, it would be dangerous for a person to tell police information about the involvement of a member of the gang in a serious crime, and there would be "severe consequences" if a person testified in court about a gang member's involvement in the killing of a police officer.

II. G. Verdict and Sentencing

On May 27, 2009, the jury found defendant guilty of the second-degree murder of Jeffrey Fontana, a peace officer engaged in the performance of his duties, with the personal use of a firearm (§§ 187, 12022.5, 12022.53; count 1), and of being a felon in possession of a firearm (§ 12021, subd. (a)(1); count 2). The jury further found true allegations that at the time of the offenses, defendant's release on bail had been revoked (§ 12022.1), and that he had a prior strike (§§ 667, subds. (b) – (i), 1170.12).

On August 7, 2009, the court sentenced defendant to life without parole on count 1, consecutive to 25 years to life for the section 12022.53 enhancement, consecutive to three years four months (one year four months on count 2 and two years for the on-bail enhancement), consecutive to the five-year-four-month term imposed in unrelated case No. CC114103 and the 16-month term imposed in the burglary case, case No. CC946256. No custody credits were awarded.

DISCUSSION

I.A. Expert Testimony on Defendant's Developmental Disabilities

As we discussed above, prior to trial, defense counsel stated that defendant would not be presenting a "diminished actuality" defense or expert testimony that would support that defense. However, in the middle of trial, defense counsel advised the court that he wanted to present testimony on mental retardation by Dr. Greenspan prior to defendant's testimony. The prosecutor objected, arguing that prior to trial defense counsel had "conceded" the motion to exclude such testimony, and that defense counsel's proffer was "so generic that we have no idea what it's actually about and how it even relates to the defendant." Defense counsel stated that "Dr. Greenspan is going to offer a diagnosis in this case. He's going to offer the foundation for that diagnosis, and he's going to rebut traditional assumptions about mental retardation. . . . [¶] Now, if, for any reason, [defendant] were not to testify, then the Court could merely strike the testimony of Dr. Greenspan, and the jury would be instructed to completely disregard it. And that would

be I think more than fair, if that's what it came down to." Counsel anticipated that "the direct examination of Dr. Greenspan would take no more than probably four hours, in that range." "I believe we have a constitutional due-process right to present this evidence."

The court ruled that Dr. Greenspan would not be allowed to testify "until after the defendant testifies. . . . [¶] Also, Dr. Greenspan's testimony is . . . going to be very abbreviated and limited. It's not going to talk about statistics other than those that relate to the defendant. The criteria from the diagnosis, age, IQ, deficits in adaptive behavior. I don't want to hear anything about talking to anecdotal people. I just want to hear about the . . . scores on the tests that he took and how that qualifies him as . . . someone with mental retardation and how mental retardation manifests itself in communication, memory, and demeanor, such as flat [affect] and stoicism." "I'm basing my decision in this . . . regard on [Evidence Code section] 352 grounds, because . . . I think it's an undue consumption of our time to go beyond the areas that I discussed, because I think they relate to how the defendant, if he does, in fact, testify, will appear on the stand." "The only thing this evidence goes to is credibility."

Defendant testified that he did not shoot Officer Fontana, that McNary shot the officer. Defendant testified that he only provided the gun to McNary, and that he took back the gun, ran, and destroyed the gun after the shooting.

Dr. Greenspan testified that defendant is mildly mentally retarded and has a mental age of between 10 and 12 years old, and an academic level of between the fifth and the seventh grade. Dr. Greenspan further testified that poor social judgment is one of the defining characteristics of people with mild mental retardation as is gullibility, or the lack of awareness of when they are being swindled or taken advantage of. A person with mental retardation can also have an antisocial personality disorder, but it is more likely that defendant has an anxiety disorder rather than an antisocial personality disorder.

The court instructed the jury pursuant to CALCRIM No. 226 that it must judge the credibility and believability of witnesses, and could consider various things when doing so.[8] The court also instructed the jury pursuant to section 1127g and CALCRIM No. 331 as follows: "In evaluating the testimony of a person with a developmental disability or a cognitive impairment, consider all the factors surrounding that person's testimony, including his or her level of cognitive development. [¶] Even though a person with a

[8] The court instructed: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. [¶] You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are: [¶] How well could the witness see, hear, or otherwise perceive the things about which the witness testified? [¶] How well was the witness able to remember and describe what happened? [¶] What was the witness's behavior while testifying? [¶] Did the witness understand the questions and . . . answer them directly? [¶] Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided? [¶] What was the witness's attitude about the case or about testifying? [¶] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? [¶] How reasonable is the testimony when you consider all the other evidence in the case? [¶] Did other evidence prove or disprove any fact about which the witness testified? [¶] Did the witness admit to being untruthful? [¶] Has the witness been convicted of a felony? [¶] Has the witness engaged in other conduct that reflects on his or her believability? [¶] Was the witness promised immunity or leniency in exchange for his or her testimony? [¶] Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently. [¶] If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on the subject. [¶] If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that the witness said. Or, if you think the witness lied about some things but told the truth about others, you may simply accept the part that you think is true and ignore the rest."

developmental disability or cognitive impairment may perform differently as a witness because of his or her level of cognitive impairment, that does not mean that he or she is more or less credible than any other witness. [¶] You should not discount or distrust the testimony of a person with a developmental disability or cognitive impairment solely because he or she has such disability or impairment." Pursuant to a request by the prosecutor, the court also instructed the jury that, "[t]he testimony of Dr. Stephen Greenspan . . . may be considered by you solely to aid in your assessment of the defendant's credibility and not for any other purpose. [¶] You are advised that the defendant is presumed to have been sane at the time of the commission of the offense charged. This means that he was able to know the nature of his act and appreciate the difference between right and wrong. [¶] There is no presumption that the defendant did, in fact, have any specific state of mind. The prosecution must prove beyond a reasonable doubt the existence of any specific state of mind necessary for a conviction."

On appeal, defendant contends that the court erred "[b]y refusing to allow evidence of [his] retardation to be used for the purpose of explaining his conduct during and after the shooting of Officer Fontana." "The excluded evidence of the social and cognitive effects of [his] retardation was not only clearly relevant, but *essential* to explaining his behavior both at the scene of the crime and in its aftermath." Defendant's "retardation and its effects on his judgment and social skills were necessary to explain his behavior at the time of the crime and his statements and behavior in its aftermath, and [he] had an absolute right to have Dr. Greenspan tell the jury about it."

The Attorney General contends that the court properly limited the scope of Dr. Greenspan's testimony. Defendant "expressly agreed at the outset of trial not to present any expert testimony on retardation in exchange for the prosecutor's dismissal of the . . . first degree murder and the related special circumstances [charges]." "More substantively, Dr. Greenspan's testimony would not have assisted the jury in its evaluation of the case." "[Defendant] described the shooting of Officer Fontana as a

sudden, unexpected event." "[I]f [defendant's] description of the shooting had in fact been true, the jurors would not have found it remarkable—or explainable only through expert testimony on retardation—that [defendant] took the gun from McNary and fled from the scene." The Attorney General further contends that any error by the court in restricting Dr. Greenspan's testimony was harmless.

Trial courts have the discretion to exclude otherwise admissible evidence pursuant to Evidence Code section 352 "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.]" (*People v. Hall* (1986) 41 Cal.3d 826, 834; *People v. Cudjo* (1993) 6 Cal.4th 585, 611.) "We review a trial court's evidentiary rulings under [Evidence Code section 352] for abuse of discretion." (*People v. Doolin* (2009) 45 Cal.4th 390, 437.) A ruling excluding evidence under Evidence Code section 352 will be overturned on appeal only if the trial court "exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

" ' "[A] trial court has wide discretion to admit or exclude expert testimony. . . . An appellate court may not interfere with the exercise of that discretion unless it is clearly abused." ' [Citation.]" (*People v. Manriquez* (1999) 72 Cal.App.4th 1486, 1492.) The trial court's exercise of its discretion is governed by Evidence Code section 801, which limits expert testimony to that "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) "Expert opinion is not admissible if it consists of inferences and

conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness. [Citation.]" (*People v. Torres* (1995) 33 Cal.App.4th 37, 45.) Therefore, the question before us is whether the trial court abused its discretion in determining that the probative value of the additional proffered testimony by Dr. Greenspan was substantially outweighed by the probability that its admission would "necessitate undue consumption of time . . . ." (Evid. Code, § 352.)

Evidence of a criminal defendant's mental retardation "is not admissible 'to show or negate the *capacity* to form any mental state,' but is admissible solely on the issue whether the accused '*actually* formed a required specific intent . . . when a specific intent crime is charged.' " (*People v. Smithey* (1999) 20 Cal.4th 936, 958 (*Smithey*); § 28, subd. (a); see also *People v. Cortes* (2011) 192 Cal.App.4th 873, 902.) "In the guilt phase of a criminal action, any expert testifying about a defendant's mental [retardation] shall not testify as to whether defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." (§ 29; *Smithey*, *supra*, at p. 958.)

The mental state required for second degree murder is malice aforethought, and malice aforethought can be either express or implied. A defendant acts with express malice aforethought if he unlawfully intends to kill. A defendant acts with implied malice if he intentionally commits an act; the natural consequences of the act are dangerous to human life; at the time he acts, he knows his act is dangerous to human life; and he deliberately acts with conscious disregard for human life. (See CALCRIM No. 520.) "To support a defense of 'diminished actuality,' a defendant presents evidence of voluntary intoxication or mental condition to show he 'actually' lacked the mental states required for the crime. [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 880, fn. 3.) "[T]he jury may generally consider evidence of voluntary intoxication or mental

condition in deciding whether defendant actually had the required mental states for the crime." (*People v. Steele* (2002) 27 Cal.4th 1230, 1253.)

In this case, as defendant's counsel stated before trial, defendant did not present a "diminished actuality" defense. Nor did counsel attempt to elicit testimony from Dr. Greenspan about defendant's mild mental retardation in order to support a "diminished actuality" defense. Rather, defense counsel offered the expert's testimony for the sole purpose of explaining defendant's conduct during and after the shooting of Officer Fontana.

Defendant testified that he did not shoot Officer Fontana, that he handed his gun to McNary, that McNary shot the officer, that defendant took back the gun and ran away, and that defendant gave the gun to Gerald Kissoon to destroy. Dr. Greenspan testified that poor social judgment is one of the defining characteristics of people with mild mental retardation as is gullibility, or the lack of awareness of when they are being swindled or taken advantage of. Dr. Greenspan also testified that a person with mental retardation can also have an antisocial personality disorder, but it is more likely that defendant has an anxiety disorder rather than an antisocial personality disorder. Defendant points to testimony about people with mild mental retardation that Dr. Greenspan gave at defendant's mental retardation hearing but that the jury did not hear at his trial. Defendant contends that the additional testimony was necessary in order to further explain defendant's actions before and after Officer Fontana's shooting. The court determined that it would be "an undue consumption of our time" to permit additional testimony regarding how people with mild mental retardation act.

Here, defendant did not present a diminished actuality defense and his defense was that he was not the shooter; his defense was not that he did not actually have malice aforethought. Defendant testified, so the jury saw him and heard his testimony regarding his defense. The jury also heard Dr. Greenspan's diagnosis of mild mental retardation for defendant, with a possible anxiety disorder, and it heard Dr. Greenspan's testimony that

people with mild mental retardation have poor social judgment and are gullible. Dr. Greenspan testified that defendant had a mental age of between 10 and 12 years old, and an academic level of between the fifth and seventh grade, and the jury could use their own common sense and experience to evaluate how such a person acts. (See CALCRIM No. 226.) Dr. Greenspan also testified about how people with mild mental retardation can appear when testifying. The court correctly instructed the jury pursuant to CALCRIM No. 226 on how to judge the credibility of a witness generally and, pursuant to section 1127g and CALCRIM No. 331, on how to evaluate defendant's credibility given Dr. Greenspan's diagnosis of defendant as having mild mental retardation. The court further instructed the jury that the testimony of Dr. Greenspan was to be considered solely on the issue of defendant's credibility. Therefore, the court could properly conclude that the relevance of additional testimony regarding how people with mild retardation act in order to explain defendant's actions before and after Officer Fontana's shooting, was outweighed by the probability that its admission would necessitate undue consumption of time. (Evid. Code, § 352.) No error or abuse of discretion has been shown.

Even if we were to determine that the court erred in refusing to admit the additional testimony, we would not find any error prejudicial. The evidence that defendant was the person who shot Officer Fontana was very strong, notwithstanding defendant's testimony that he was not the shooter. The jury saw, heard, and evaluated the testimony of defendant and Dr. Greenspan. The court correctly instructed the jury pursuant to section 1127g and CALCRIM No. 331 on how to evaluate defendant's testimony given Dr. Greenspan's diagnosis of mild mental retardation. The court also instructed the jury that Dr. Greenspan's testimony was to be considered solely on the issue of defendant's credibility. On this record, we cannot say that any error by the trial court in excluding the testimony defendant points to on appeal resulted in a miscarriage of justice. (Evid. Code, § 354.)

I.B. Third-Party Culpability Evidence

Defendant contends that, "[a]lthough the trial court allowed the defense to present *some* of the evidence pointing to McNary's culpability, the court prejudicially restricted the admission of that evidence on repeated occasions. . . . [E]ach of these rulings constituted an abuse of the discretion vested in the trial court." Defendant specifically contends that the court should have admitted: (1) testimony by Janielle Carter, McNary's girlfriend, that McNary called his lawyer shortly after Fontana's murder; (2) testimony by Eric McLaurin that McNary told him that McNary had shot the police officer; (3) testimony by David Jackson that McNary "smirked" after saying that defendant did not shoot the officer; (4) testimony by Lacey Ortez and Janee Gilmore that they were afraid of McNary in part because of their personal knowledge of his prior bad acts; and (5) testimony regarding Steven Eddie's contact with police in the vicinity of the shooting of Officer Fontana within hours of the shooting.

The Attorney General contends that the trial court reasonably prohibited defendant from introducing the testimony he claims was erroneously excluded. The Attorney General contends that the court reasonably excluded testimony regarding McNary's alleged call to his attorney on a number of grounds, the court properly found that McLaurin's and Jackson's proposed testimony would be too untrustworthy to be admissible, the proposed testimony by Ortez and Gilmore was cumulative, and the proposed testimony regarding Eddie was irrelevant.

" 'A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt. This rule does "not require that any evidence, however remote, must be admitted to show a third party's possible culpability . . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." [Citation.]' [Citations.]" (*People v. Panah*

(2005) 35 Cal.4th 395, 481 (*Panah*); see also *People v. Geier* (2007) 41 Cal.4th 555, 581 (*Geier*).) " '[T]he evidence [has] to be relevant under Evidence Code section 350, and its probative value [can]not be "substantially outweighed by the risk of undue delay, prejudice, or confusion" under Evidence Code section 352.' [Citation.]" (*Geier*, *supra*, at p. 581.) On appeal, "we review the ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm." (*Id*. at p. 582.)

In *Geier*, the defendant sought to admit testimony by a witness, Green, that Green saw a third party, Sloan, with the victim on the night of the victim's murder, and that Sloan later told Green that Sloan had dropped off the victim at her apartment. Our Supreme Court found that Green's testimony was properly excluded. "Such evidence does not rise even to the status of motive evidence. While it could be generously construed as possible evidence that Sloan had the opportunity to commit the crimes, as noted, evidence of mere opportunity without further evidence linking the third party to the actual perpetration of the offense is inadmissible as third party culpability evidence." (*Geier*, *supra*, 41 Cal.4th at p. 582.) The defendant also sought to admit testimony by another witness, Harrison, that Sloan made comments that could be construed as an admission that he killed the victim. Our Supreme Court found that this evidence was properly excluded under Evidence Code section 352. "In light of the confused and contradictory tenor of Harrison's testimony—asserting at one point that Sloan said someone was framing him for the murder, and at another, that he confessed to it—her testimony possessed, as the prosecutor noted, 'minimal probative value.' Balanced against this minimal probative value was the 'probability' that the admission of Harrison's testimony would have 'necessitate[d] undue consumption of time or . . . confus[ed] the issues, or misle[d] the jury.' (Evid. Code, § 352.)" (*Geier*, *supra*, 41 Cal.4th at p. 582.)

I. B. 1. Testimony by Carter that McNary Called his Lawyer

Evidence was introduced that McNary had been driving Carter's car when he hit a parked car and an individual standing in the street as he was driving away from the Rotterdam Lane party. Accordingly, even if the proffered testimony by Carter that McNary called his attorney shortly after Officer Fontana was shot would suggest that McNary had a "guilty mental state" as defendant contends, it does not necessarily follow that McNary must have felt guilty about having shot Officer Fontana; he could have felt guilty about fleeing the scene where he hit a parked car and an individual. As the proffered testimony does not link McNary to the actual perpetration of the shooting of Officer Fontana, the court was not required to admit the proffered testimony as third-party culpability evidence. (*Panah*, *supra*, 35 Cal.4th at p. 481.)

I. B. 2. Testimony by McLaurin regarding McNary's Confession

The proffered evidence regarding Eric McLaurin was that defendant's family members claimed that McLaurin told them that McNary told him that he, McNary, killed the police officer. However, McLaurin told the police that he did not remember ever saying that, and that defendant's family was trying to intimidate him. McLaurin testified, and a recording of his police interview was played for the court, at an Evidence Code section 405 hearing prior to defendant's 2007 mental retardation hearing. When defense counsel told the court in January 2009 that he intended to call McLaurin to testify, the prosecutor told the court that McLaurin was not providing consistent statements, that the prosecution would need to bring in additional witnesses to impeach McLaurin, and that the prosecution had "a previous statement by McNary to the police officers, and a taped statement, in which he convincingly says he didn't do it." The court ruled that, "[a]fter having actually observed Mr. McLaurin and reading . . . the *Geier* case, I think that Mr. McLaurin's various versions of the information really fall within the paradigm of the *Geier* case. And so I'm going to be excluding those under [Evidence Code section] 352."

Given the contradictory nature of the proffered evidence regarding McLaurin, and the fact that it involved double hearsay, it had minimal probative value. In addition, there was the probability that the presentation of the evidence would have necessitated undue consumption of time, or confused the issues, or misled the jury. (Evid. Code, §352.) Therefore, the testimony by McLaurin was similar to the testimony the *Geier* court found was properly excluded, and the court in this case did not err or abuse its discretion in excluding this evidence. (*Geier*, *supra*, 41 Cal.4th at p. 582.)

I. B. 3. Testimony by Jackson that McNary Smirked

The court admitted testimony from David Jackson that McNary told him that defendant did not shoot the officer, and then McNary pulled out a gun and robbed Jackson. Defense counsel sought admission of additional testimony from Jackson that, immediately after McNary said that defendant did not shoot the officer, Jackson asked McNary who did shoot the officer. McNary then had "a look on his face 'like a smirk,' " before he pulled out a gun and robbed Jackson. Defense counsel argued that the "smirk" or "smile" was an adoptive admission, a statement against penal interest by an unavailable witness, and evidence of McNary's state of mind. However, McNary's smirk does not qualify as an admissible adoptive admission under Evidence Code section 1221 because McNary was not a "party" in this case. (Evid. Code, § 1221.)[9]

For the same reason, McNary's smirk does not qualify as an admissible "statement" or "nonverbal conduct" under Evidence Code sections 225 and 1220.[10] (See

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[9] "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which *the party*, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221, italics added.)

[10] " 'Statement' means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (Evid. Code, § 225.) "Evidence of a statement is not made inadmissible by the hearsay

People v. Hawkins (2002) 98 Cal.App.4th 1428, 1449.) In addition, Jackson's opinion of what McNary meant by the smirk was speculative; although McNary could have meant by the smirk to convey to Jackson that he knew who the actual shooter of Officer Fontana was, that does not mean that McNary necessarily meant to convey to Jackson that the shooter was McNary himself. Therefore, it cannot be said that when McNary made the smirk it "was so far contrary to [his] pecuniary or proprietary interest, or so far subjected him to the risk of . . . criminal liability, . . . that a reasonable man in his position would not have made the statement [or nonverbal conduct] unless he believed it to be true." (Evid. Code, 1230.) Given the speculative nature of this proposed testimony, it had little to no probative value on the issue of McNary's culpability, and the court did not err or abuse its discretion in excluding it under Evidence Code section 352.

I. B. 4. Testimony by Ortiz and Gilmore

The court admitted testimony from Lacey Ortez and Janee Gilmore about their fear of McNary. Ortez testified that she and her husband moved because she was afraid that McNary "was going to come and get us" shortly after McNary told her husband that he was involved in the shooting of a police officer. She also believed that she was in danger for testifying. Gilmore testified that McNary confessed to her that he did the shooting. However, she did not want to tell anybody about the confession, or testify about it, because McNary threatened her and she feared McNary and his "people." She was testifying about it only because, if she did not do so, she would be put in jail. The court further admitted testimony that McNary was a member of the Seven Trees Crip criminal street gang, that the primary activities of the gang included homicides and witness intimidation, and that there would be "severe consequences" if a person testified about a gang member's involvement in the killing of a police officer.

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rule when offered against the declarant in an action to which he is *a party* . . . ." (Evid. Code, § 1220, italics added.)

Defense counsel sought admission of additional testimony by Ortez and Gilmore that their fear of McNary was based on their knowledge of his involvement in the Seven Trees Crip gang. As the jury heard testimony that Ortez and Gilmore did not want to testify because of threats by McNary and their fear of him, and testimony that McNary was a member of the Seven Trees Crip gang, any error in not admitting additional testimony that Ortez and Gilmore knew that McNary was a member of the Seven Trees Crip gang did not result in a miscarriage of justice. (Evid. Code, § 354.)

I. B. 5. Testimony about Steven Eddie

Defense counsel sought to introduce evidence that Steven Eddie was stopped by Officer Jacob Ferguson between 6:30 and 7:00 a.m., on the morning of the shooting of Officer Fontana. Because Eddie was on parole, he was detained, taken to the police department, and subjected to a gunshot residue test that morning. Defense counsel argued that this showed that Officer Barg could have followed the same procedure when he stopped McNary around 5:30 a.m., and that Barg and his sergeant were negligent in releasing McNary without giving McNary a gunshot residue test. As the trial court found, evidence that a different officer subjected a different parolee to a gunshot residue test on the morning of the shooting of Officer Fontana (which could suggest that Officer Barg could have subjected McNary to a gunshot residue test that morning) was not relevant evidence in this case, as the evidence would not have had a tendency in reason to prove or disprove defendant's theory of defense that McNary was the person who shot Officer Fontana. (Evid. Code, § 210.) Accordingly, the court did not err or abuse its discretion in excluding the evidence under Evidence Code section 352.

I. C. Pinpoint instruction on Third-Party Culpability Evidence

Defendant contends that the court erred in refusing to give his proposed pinpoint instruction on third-party culpability evidence. The Attorney General contends that the court properly denied defendant's request for a pinpoint instruction.

Defense counsel requested that the court give the following instruction to the jury: "You have heard evidence that [a person other than the defendant] [Rodney McNary] committed the offense with which the defendant is charged. The defendant is not required to prove [Rodney McNary's] guilt beyond a reasonable doubt. It is the prosecution that has the burden of proving the defendant guilty beyond a reasonable doubt. Therefore, the defendant is entitled to an acquittal if you have a reasonable doubt as to the defendant's guilt. Evidence that [Rodney McNary] committed the charged offense may by itself leave you with a reasonable doubt. [¶] If after considering all of the evidence, including any evidence that another person committed the offense, you have a reasonable doubt that the defendant committed the offense, you must find the defendant not guilty." The court denied defendant's request, finding the requested instruction "redundant for [CALCRIM No.] 220." The court also noted that the instruction was refused in *People v. Earp* (1999) 20 Cal.4th 826 (*Earp*). However, the court did give defendant's requested pinpoint instructions regarding evidence of McNary's motive and flight.[11]

"A criminal defendant is entitled, on request, to an instruction 'pinpointing' the theory of his defense. [Citations.] . . . [H]owever, instructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative [citation], and the effect of certain facts on identified theories 'is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate.'

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[11] The court instructed the jury: "Presence of motive in Rodney McNary may be a factor tending to show that he shot and killed Officer Fontana. Not having a motive may be a factor tending to show that he did not shoot and kill Officer Fontana. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled." "If Rodney McNary fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that Rodney McNary fled, it is up to you to decide the meaning and importance of that conduct."

[Citation.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 570 (*Wharton*); see also *People v. Wright* (1988) 45 Cal.3d 1126, 1137, 1143 (*Wright*).)

In *Wright*, our Supreme Court reaffirmed its disapproval of " 'the common practice [of] select[ing] certain material facts, or those which are deemed to be material, and endeavoring to force the court to indicate an opinion favorable to the defendant as to the effect of such facts, by incorporating them into instructions containing a correct principle of law' . . . ." (*Wright, supra*, 45 Cal.3d at p. 1135.) Thus, the court disapproved as "argumentative" an instruction requested by the defendant that would have instructed the jury to "consider" various pieces of evidence, such as the fact that all the robbers wore ski masks, in assessing the defendant's guilt. (*Id*. at pp. 1138, 1135.) A pinpoint instruction is also "argumentative" when it "invite[s] the jury to draw inferences favorable to only one party from the evidence presented at trial." (*People v. Carter* (2003) 30 Cal.4th 1166, 1225; see also *Earp, supra*, 20 Cal.4th at pp. 886-887 [requested instruction was "plainly argumentative" as it emphasized specific evidence defendant claimed raised reasonable doubt].)

"Further, '[i]t is not erroneous to refuse' even a legally correct instruction if it is duplicative. [Citation.]" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1079, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 (*Hill*).) A trial court is not required to give requested instructions which are duplicative of the legal concepts in other given instructions. (*People v. Farmer* (1989) 47 Cal.3d 888, 913-914, overruled on another point in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6; *Wright, supra*, 45 Cal.3d at p. 1134.) Any error in refusing a requested pinpoint instruction is reviewed under the standard enunciated in *People v. Watson* (1956) 46 C.2d 818, 836: is it reasonably probable that a result more favorable to defendant would have been reached in the absence of the error? (*Wharton, supra*, 53 Cal.3d at p. 571.)

Defendant's proposed pinpoint instruction that the court refused to give was both duplicative and argumentative. The proposed instruction was duplicative of the

instruction the court gave on reasonable doubt (CALCRIM No. 220). That instruction informed the jury that the People have the burden of proving the defendant guilty beyond a reasonable doubt and that, in deciding whether the People have proved the case beyond a reasonable doubt, the jury must impartially consider all the evidence that was received throughout the entire trial. The proposed instruction was also argumentative in that it invited the jury to find defendant not guilty upon finding that there was some evidence supporting defendant's claim that McNary committed the charged offense: "Evidence that [Rodney McNary] committed the charged offense may by itself leave you with reasonable doubt." (See *Earp, supra,* 20 Cal.4th at pp. 886-887.)

The jury knew from the evidence presented and defense counsel's argument that the defense theory was that McNary, not defendant, was the shooter. The court also gave defendant's pinpoint instructions regarding evidence of McNary's motive and flight. Under the circumstances, even assuming that the court erred in refusing to give defendant's other proposed pinpoint instruction, it is not reasonably probable that had the jury been given the instruction, a result more favorable to defendant would have been reached. (*Earp*, *supra*, 20 Cal.4th at pp. 886-887; *People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837.)

I. D. Restriction of Defense Argument

Defendant acknowledges that McNary did not testify at trial because (1) he had invoked his Fifth Amendment right not to do so at a pretrial hearing and the prosecutor refused to offer him immunity, and (2) at the time of trial, he had absconded from parole. Nevertheless, defendant contends that the court improperly prohibited his counsel from commenting during closing argument on the prosecutor's failure to call McNary as a logical witness. "Because the prosecution's refusal to grant McNary immunity was discretionary, there was no valid legal reason not to allow the defense to comment on [the prosecution's] failure to exercise that discretion and call McNary, a logical witness, to permit the jury to assess the credibility of his story."

The Attorney General contends that "the defense attorney could not have honestly argued that McNary's failure to testify somehow reflected badly on the prosecution's case. A trial court is not[ ]required to allow a lawyer to argue false inferences to the jury."

"If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, . . . neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding." (Evid. Code, § 913, subd. (a).) "A person may invoke the constitutional privilege against self-incrimination for a reason other than guilt." (*People v. Mincey* (1992) 2 Cal.4th 408, 441.) Accordingly, a court does not err by refusing a party's request to compel a witness to invoke before the jury the witness's privilege against self-incrimination. (*Id*. at p. 442.) In addition, the prosecution is not obligated to grant immunity to a potential defense witness in order to assist a defendant, or to make reasonable efforts to persuade a potential witness to testify. (§ 1324; *People v. Williams* (2008) 43 Cal.4th 584, 622-623.) As defendant has not shown that McNary was available to testify at the time of defendant's trial, and that McNary would have testified had he been called to testify, the court did not err in refusing defendant's request to allow his counsel to comment on the prosecutor's failure to call McNary as a logical witness. (*Mincey*, *supra*, 2 Cal.4th at p. 442 ["A defendant's rights to due process and to present a defense does not include a right to present to the jury a speculative, factually unfounded inference"].)

II. Admission of McNary's Out-of-Court Statements

Prior to trial, the court granted defense counsel's request, over the prosecutor's objection, to allow Janee Gilmore to testify that she heard McNary confess to shooting Officer Fontana. The prosecutor told the jury in his opening statement that McNary has said that he did not shoot Officer Fontana. Defense counsel told the jury in his opening

statement that Gilmore would confirm the defense theory that McNary had shot Officer Fontana by testifying that McNary had confessed the killing to her. The prosecution then moved to call Gilmore during its case-in-chief and to impeach McNary's statements to Gilmore by offering other statements by McNary that were inconsistent with the declaration against penal interest he made to Gilmore. The prosecutor argued that Evidence Code section 1202 and *People v. Osorio* (2008) 165 Cal.App.4th 603 (*Osorio*) permitted this procedure. Defendant objected, arguing that what the prosecutor wanted to do was "back door in McNary's denial of shooting Fontana" under Evidence Code section 1202. "[H]e wants to impeach Janee Gilmore. He does not want to impeach Rodney McNary." Defendant also objected to admission of evidence of McNary's denials on the basis of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), and Evidence Code section 352. The court granted the prosecutor's motion, finding that the prosecutor had established, "under the *Osorio* case, that this is not testimonial and therefore doesn't implicate *Crawford* and that it comes within [Evidence Code section] 1202 and is proper."

During the prosecutor's case-in-chief, after the jury heard Gilmore's testimony regarding McNary's confession to her, Officer Imobersteg's testimony about McNary's unrecorded police interview on the day of the shooting, McNary's recorded police interview, and Officer Pete Ramirez's testimony about McNary's unrecorded interview several years later, the court instructed the jury that "the recorded statement of Mr. McNary does not come into evidence for the truth of the matter, but for the purpose and only the purpose of impeaching the statements he made to Janee Gilmore, which she testified about. [¶] And the same is true with his statement to Officer Imobersteg." The jury then heard testimony from David Lucio, an investigator associated with the public defender's office, that McNary said "basically" the same thing to him that he had said in his police interviews. The jury later heard testimony from Sally Graver, a private investigator working with defense counsel, that she interviewed McNary twice, the first

time in September 2004, and the second time in January 2005. Graver testified that during both interviews, McNary's statements to her about what he did on the night of Officer Fontana's shooting were generally consistent with his statements to the police. At the close of the trial, the court instructed the jury as follows: "Rodney McNary did not testify in this trial, but statements he made at an earlier time were introduced through the testimony of Janee Gilmore and Lacey Ortez. In addition to this testimony, you have heard evidence that Rodney McNary made statements to David Lucio and Sally Graver and also to Detectives Edwards and Ramirez, which were recorded. [¶] If you decide that Rodney McNary made those statements to David Lucio, Sally Graver, and the tape recording of Rodney McNary's interviews with Detectives Edwards and Ramirez, you may only consider them in a limited way. You may use them only in deciding whether you believe the statements made by McNary to Janee Gilmore and Lacey Ortez. You may not use these statements as proof that the information contained in them is true, nor may you use them for any other purpose."

Defendant now contends that the court erred in admitting McNary's out-of-court exculpatory statements. "McNary's statements to police and defense investigators could impeach his confession to Gilmore only if the jurors determined that the former statements were true. Moreover, McNary's out-of-court statements to the effect that he did not shoot the officer went directly to the heart of the central issue in the case. Under these circumstances, despite the general presumption that jurors follow the instructions given them, and notwithstanding the trial court's limiting instructions, the admission of McNary's repeated denials of guilt bore an undue risk of confusing the jurors and causing them to consider McNary's statements for the underlying truth. . . . As against this strong risk of confusing the jury, the prosecution had no need at all, nor a foundation, for introducing the evidence." Defendant also contends that admission of McNary's out-of-court exculpatory statements violated defendant's Sixth Amendment right to confront witnesses.

The Attorney General contends that the court properly allowed the prosecutor to call Gilmore and to present other testimony in his case-in-chief in order to address defendant's theory of defense. The Attorney General argues that the prosecutor was entitled to use hearsay to impeach Gilmore's and Ortiz's testimony regarding what McNary said to them. "Because McNary had invoked the Fifth Amendment and subsequently absconded from parole, the only possible way for the prosecutor to rebut the defense evidence was through McNary's prior denials of guilt. Evidence Code section 1202 expressly allows a party to present hearsay for such a purpose, i.e., to impeach hearsay offered on behalf of the same declarant." The Attorney General further contends that admission of McNary's out-of-court exculpatory statements did not violate defendant's right to confront witnesses.

A trial court has discretion, within the limits of Evidence Code section 352, to permit the prosecution to introduce during its case-in-chief evidence on a witness's credibility when the prosecution reasonably anticipates the defense will place the witness's credibility at issue. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1085 [defense signaled a strategy of challenging the witness's credibility as early as the preliminary hearing].) " 'As a general matter, an appellate court reviews a trial court's ruling as to the order of proof for abuse of discretion. That is because, as a general matter, the trial court has authority to "regulate the order of proof" in the exercise of "its discretion." (Evid. Code, § 320.)' [Citations.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 175.)

Evidence Code section 1202 "governs the impeachment of hearsay statements by a declarant who does not testify at trial." (*People v. Blacksher* (2011) 52 Cal.4th 769, 806 (*Blacksher*).) Evidence Code section 1202 states, in relevant part: "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct."

" '[Evidence Code s]ection 1202 deals with the impeachment of a declarant whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. It clarifies two points. *First*, evidence to impeach a hearsay declarant is not to be excluded on the ground that it is collateral. *Second*, the rule applying to the impeachment of a witness—that a witness may be impeached by an inconsistent statement only if he [or she] is provided with an opportunity to explain or deny it—does not apply to a hearsay declarant.' [Citation.]" (*Blacksher, supra*, at p. 806, fn. 22.)

Evidence Code section 785,[12] which was added as part of the same bill that added Evidence Code section 1202, allows the credibility of a witness to be attacked by any party. (*Osorio, supra,* 165 Cal.App.4th at pp. 616-617; *Blacksher, supra,* 52 Cal.4th at p. 807.) "Because the Legislature did not expressly make Evidence Code sections 785 and 1202 mutually exclusive, *Osorio* concluded that both sections should be read together and 'as a single statute, these two sections allow a prosecutor to use a prior inconsistent statement to partially impeach a hearsay statement the prosecutor had previously introduced.' [Citation.]" (*Blacksher, supra*, at pp. 807-808.) "[T]he result in *Osorio* was . . . correct. The inconsistent statements at issue in *Osorio* were not hearsay because they were not admitted for their truth. Accordingly, the defendant's inability to cross-examine the declarant about those statements raised no confrontation clause concerns [under the *Crawford* rule]." (*Blacksher, supra*, at p. 808; see also *id*. at fn. 23.)

In this case, the court properly allowed the prosecutor to present McNary's out-of-court exculpatory statements. The court had previously ruled that defendant could present evidence that McNary had confessed to shooting Officer Fontana, and defense counsel informed the jury during opening statements that Gilmore would testify to that effect. Accordingly, the defense put McNary's credibility at issue, and the prosecutor

[12] Evidence Code section 785 states: "The credibility of a witness may be attacked or supported by any party, including the party calling him."

could properly attack McNary's credibility during its case-in-chief. (*People v. Mendoza*, *supra*, 52 Cal.4th at p. 1085.) In addition, Evidence Code sections 785 and 1202 allowed the prosecutor to attack McNary's credibility using his prior inconsistent statements. (*Osorio*, *supra*, 165 Cal.App.4th at pp. 616-617; *Blacksher*, *supra*, 52 Cal.4th at p. 807.) And, admission of the prior inconsistent statements did not violate *Crawford*, as the statements were not admitted for their truth. (*Blacksher*, *supra*, at p. 808.) The court instructed the jury that the statements were not admitted for their truth, and that the jury could use them only to assess McNary's credibility, and we must presume that the jury understood and followed the court's instruction. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 (*Mickey*).) No confrontation or due process violation has been shown.

III. A. Evidence of Defendant's Uncharged Offenses

As stated above, the jury heard evidence of the facts underlying three incidents involving defendant's uncharged offenses. The first incident occurred in October 2000, when defendant was stopped by an officer for riding a minibike without a helmet. The officer needed to force defendant to the side of the road because defendant did not stop right away. When the officer reached inside defendant's pocket, with defendant's permission, and then pulled out items from the pocket, defendant pushed his body onto the officer and attempted to grab the items out of the officer's hand. When the officer pushed defendant away, defendant took off running. The officer discovered he had defendant's ID, some cash, and five baggies of marijuana.

The second incident occurred in June 2001, when officers approached defendant inside a Good Guys store because store employees reported that defendant had tried to use a stolen credit card. Defendant ran from the officers and, when one officer stood in front of the open store door, defendant ran into the officer, pushing him to the ground. Defendant then violently struggled in an attempt to get away from both officers, causing injuries to both officers. Even though defendant was handcuffed, other officers needed a leg-wrap restraint in order to put defendant into a patrol car.

The third incident occurred in September 2001, when an off-duty police officer approached defendant and another man who were confronting the officer's neighbors on the street outside their homes late at night. Defendant appeared to be under the influence and became agitated and aggressive. When the officer attempted to arrest defendant, defendant kicked the officer's right leg out from under him, struck him on the back of the head with a flashlight, and ran away. The officer needed stitches in his head as a result of his injuries.

At the close of the case, the court instructed the jury in relevant part: "During the trial certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." "The People have presented evidence that the defendant committed other offenses of resisting arrest, evading a peace officer, simple battery on a peace officer, trying to prevent or deter an executive officer from performing that officer's duty, and assault with a deadly weapon which are not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offenses. . . . [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may but are not required to consider that evidence for the limited purpose of deciding whether or not the defendant had a motive to commit the offense charged in Count 1; namely, murder. [¶] Do not consider this evidence for any other purpose . . . . [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime."

In his closing argument, the prosecutor relied on the uncharged offense evidence to show that, although there was no evidence that McNary had ever violently resisted arrest, the evidence showed that defendant had "a documented history of absolute uncontrolled frenzy to resist an arrest," "a pathological aversion to arrest." "So I think it's wrong to say that [defendant] killed because he had two warrants out for his arrest,

because I don't think . . . that exactly described what's happening." "What I think was happening is that he has some type of flaw, a dangerous flaw: that he will not submit to an arrest and respond with force and violence to avoid apprehension." "That's his flaw. And that explains the motive. Because he is a flawed person, because he is pathologically averse to submitting to arrest, you can see how this would happen." "What I'm saying is this guy was a time bomb. And, unfortunately, Jeff Fontana didn't know that he was stopping a time bomb." Defendant did not object to this argument by the prosecutor.

On appeal, defendant contends that none of the testimony regarding the uncharged offenses was admissible, and that the admission of the testimony denied him a fair trial. He argues that evidence of uncharged offenses is not admissible on the issue of motive unless the other offenses were so substantially similar to the charged crime "as to evidence the perpetrator's 'signature,' " and that the evidence of the incidents at issue was "far from 'like a signature.' " He further argues that the evidence was far more prejudicial than probative, and that the prosecutor "blatantly" improperly used the evidence to prove defendant's "*propensity of character* to commit violence against police officers." "[T]he prosecution's use of the other-crimes evidence to make a propensity argument is probative of the harm that resulted from the erroneous admission of that evidence."

The Attorney General contends that the evidence of defendant's prior offenses was properly admitted. The Attorney General argues that the offenses were "extremely" probative of defendant's mental state at the time of the charged offense, they were not the types of offenses that would have inflamed the passions of the jury unfairly against defendant, and the court's limiting instructions further minimized any possibility of prejudice. The Attorney General further argues that defendant forfeited any claim of error based on the prosecutor's closing argument by failing to raise an objection below, and that "[e]ven if the prosecutor's rhetoric became overheated in a few passages of a

very lengthy argument, the strength of the evidence as a whole rendered any error harmless."

Evidence Code section 1101, subdivision (a) states in relevant part: "Except as provided in this section . . . , evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion." Subdivision (b) of this section provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, . . . when relevant to prove some fact (such as motive . . .) other than his or her disposition to commit such an act."

" 'As Wigmore notes, admission of this evidence produces an "over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts." [Citation.] It breeds a "tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offen[s]es . . . ." [Citation.] Moreover, "the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor." [Citation.]' [Citation.]" (*People v. Foster* (2010) 50 Cal.4th 1301, 1331 (*Foster*); *People v. Fuiava* (2012) 53 Cal.4th 622, 667 (*Fuiava*).) Since substantial prejudice is inherent in admitting evidence of uncharged offenses, evidence of such offenses is admissible only if it has " '*substantial* probative value.' " (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *Foster, supra,* at p. 1331.) Moreover, the probative value of the evidence of any uncharged offense must be weighed against the danger "of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) The "undue prejudice" referred to in Evidence Code section 352 "is not synonymous with 'damaging,' but refers instead to evidence that ' "uniquely tends to evoke an emotional bias against defendant" ' without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

" ' "[W]hen the commission of a criminal act [(the crime for which defendant is on trial)] is a disputed issue, evidence of *motive* may become relevant to that issue.

Motive is itself a state-of-mind or state-of-emotion fact. Motive is an idea, belief, or emotion that impels or incites one to act in accordance with his state of mind or emotion. Thus, evidence, offered to prove motive, that defendant committed an uncharged offense meets the test of relevancy by virtue of the circumstantial-evidence-reasoning process that accepts as valid the principle that one tends to act in accordance with his state of mind or emotion." [Citation.]' [Citations.]" (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1382-1383 (*Spector*).)

"Although motive is not an element of any of defendant's crimes, 'the absence of apparent motive may make proof of the essential elements less persuasive . . . .' [Citation.]" (*People v. Davis* (2009) 46 Cal.4th 539, 604.) "Because a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." (*People v. Lopez* (1969) 1 Cal.App.3d 78, 85.)

"Other crimes evidence is admissible to establish two different types or categories of motive evidence. In the first category, 'the uncharged act supplies the motive for the charged crime; the uncharged act is cause, and the charged crime is effect.' [Citation.] 'In the second category, the uncharged act evidences the existence of a motive, but the act does not supply the motive. . . . [T]he motive is the cause, and both the charged and uncharged acts are effects. *Both crimes are explainable as a result of the same motive*.' [Citation.] [¶] California case law allows the admission of other crimes evidence to prove this second kind of motive. (See *People v. Davis*[, *supra*,] 46 Cal.4th 539, 604 [evidence of two prior sexual assaults on children involving bondage tended to show defendant had motive for sexually assaulting murder victim]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 15 [evidence of prior assault and robbery of different victim tended to show defendant had motive to rob victim killed in current case]; *People v. Walker* (2006) 139 Cal.App.4th 782, 803 [in trial for murdering prostitute, evidence of prior sexual assaults tended to show defendant's ' "common motive of animus against

prostitutes resulting in violent batteries interrupting completion of the sex act" ']; *People v. Pertsoni* (1985) 172 Cal.App.3d 369, 375 [in trial for murdering man affiliated with Yugoslav government, evidence defendant had previously shot at person he thought was Yugoslavian ambassador tended to show that defendant's hatred of Yugoslav government impelled him to kill current victim].)" (*Spector*, *supra*, 194 Cal.App.4th at pp. 1381-1382, fn. omitted.) "Both *People v. Walker*, *supra*, 139 Cal.App.4th 782, and *People v. Scheer* (1998) 68 Cal.App.4th 1009, acknowledged the legitimacy of category two motive evidence although they characterized it as 'common plan' evidence. (See *People v. Walker*, *supra*, at p. 804.)" (*Spector*, *supra*, at p. 1382, fn. 17.)

"[T]he probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus. [Citations.]" (*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 15.)

" 'Rulings made under [Evidence Code sections 1101 and 352] are reviewed for an abuse of discretion. [Citation.]' [Citation.] 'Under the abuse of discretion standard, "a trial court's ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citation.]" (*Foster*, *supra*, 50 Cal.4th at pp. 1328-1329; see also *Fuiava*, *supra*, 53 Cal.4th at pp. 667-668.)

In this case, the evidence of the facts underlying the uncharged offenses was admitted to show that defendant had a motive for shooting Officer Fontana. Evidence of defendant's motives for assaulting other officers or people attempting to apprehend him tended to show that defendant had the same motive when he assaulted and killed Officer Fontana. The challenged evidence showed that prior to the shooting, when defendant was approached, stopped, or arrested by a police officer or someone else who attempted to apprehend him, he acted aggressively and violently, often physically harming the apprehending person. In October 2000, when an officer made a traffic stop and then

pulled five bags of marijuana out of defendant's pocket, defendant pushed his body against the officer, attempted to grab the items out of the officer's hand, and then took off running. In June 2001, defendant ran from two officers who approached him inside a store; he took one officer to the ground and violently struggled with both officers, injuring both officers; and other officers needed a leg-wrap restraint in order to place defendant in a patrol car. In September 2001, when an off-duty police officer attempted to arrest defendant for being drunk in public and creating a disturbance, defendant kicked the person's leg out from under him, hit the person in the head with a flashlight, and ran away. In October 2001, Officer Fontana was shot after he parked behind defendant's car near where defendant and McNary had earlier abandoned McNary's car. McNary's car had earlier hit a car and a person while McNary and defendant were fleeing from a fight at a party. Thus, both the uncharged offenses and the charged crimes were explainable as a result of the same motive. (*Spector*, *supra*, 194 Cal.App.4th at p. 1381.) That is, "the other crimes evidence in this case was admissible because it tended to show [defendant] had acted with the same state of mind or 'state of emotion' in both the charged and the uncharged offenses." (*Id*. at p. 1383; see also *Fuiava*, *supra*, 53 Cal.4th at p. 668.)

The challenged evidence was highly relevant to the disputed facts, and it was no more inflammatory than the evidence concerning the charged offense of murder of a police officer during the performance of his duties. In addition, the jury was instructed that the evidence of the uncharged offenses could not be considered as proof that defendant is a person of bad character or that he has a disposition to commit crimes. The jury was instructed that the evidence could be considered for the limited purpose of determining if it tends to show the existence of a motive for the commission of the charged crime, and for no other purpose; that the People are not required to prove that defendant had a motive but, in reaching its verdict, it may consider whether defendant did have a motive; and that "[h]aving a motive may be a factor tending to show that the defendant is guilty [whereas n]ot having a motive may be a factor tending to show the

defendant is not guilty." The jury was also instructed that it must decide what happened based only on the evidence presented, that the attorneys' remarks during closing arguments are not evidence, and that it must follow the court's instructions even if it believes that the attorneys' comments conflict with the instructions. These instructions ameliorated any potential misapplication of the challenged evidence due to the prosecutor's closing remarks, and we must presume that the jury understood and followed the instructions. (See *People v. Osband* (1996) 13 Cal.4th 622, 717.) The jury also heard evidence that defendant knew that he had outstanding bench warrants and that he did not want to go back to jail, which was relevant to the special allegation that defendant's bail had been revoked at the time of Officer Fontana's shooting but which also showed that defendant had a motive to shoot the officer. Defendant has not shown that the trial court abused its discretion in admitting the testimony regarding the facts underlying the uncharged offenses.

Even if we were to find that the court erred in admitting evidence of the facts underlying some or all of the uncharged offenses on the issue of motive, we would find any error not prejudicial. The evidence showed that defendant was with McNary when McNary hit a car and an individual in the street as he was speeding away from a party earlier in the same evening that Officer Fontana was shot and killed. Defendant testified that he had his father's gun when Officer Fontana approached him and McNary near where he and McNary abandoned the car McNary had been driving. Defendant also testified that it was McNary and not defendant who shot and killed the officer. The court instructed the jury that having a motive may be a factor tending to show that defendant is guilty of the charged murder while not having a motive may be a factor tending to show that defendant is not guilty. The court similarly instructed the jury at defendant's request regarding the presence or absence of motive in Rodney McNary. Evidence that defendant had prior convictions was admitted as impeachment evidence, the facts underlying the uncharged prior offenses were not admitted to show defendant's

disposition to commit the charged murder, and the jury was instructed not to consider the uncharged offense evidence to prove that defendant has a bad character or is disposed to commit crime. The evidence regarding the uncharged offenses was no more prejudicial or inflammatory than the properly admitted evidence that defendant failed to appear in criminal court on forgery and theft charges, that his bail was revoked, that he had two outstanding arrest warrants, and that he told a friend he did not want to turn himself in because he knew he was facing three to five years in prison. Under the facts of this case, it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of the evidence of his prior uncharged offenses. Therefore, defendant cannot show that admission of the evidence of his prior uncharged offenses " 'resulted in a manifest miscarriage of justice.' " (*Foster*, *supra*, 50 Cal.4th at p. 1329.)

III. B. Other Bad Acts Evidence

Defendant contends that the court also abused its discretion by admitting other irrelevant and prejudicial bad character evidence. Specifically, he challenges the admission of evidence that (1) a .357-caliber gun and .357-caliber ammunition were found during the search of defendant's residence; (2) a resident of Calle Almaden reported on the morning of Officer Fontana's shooting that he had seen defendant in the back seat of the Hyundai in the area a month earlier, and that something caused the resident to report it to the police at that time; and (3) Rueben Martinez, a neighbor of defendant's family, had negative things to say about activity at the Campbell residence. Defendant argues that this evidence "had no conceivable relevance to proof of the murder of Officer Fontana other than through the impermissible means of proving [defendant's] bad character (Evid. Code, § 1101, subd. (a)), and which also was far more prejudicial than probative (Evid. Code, § 352)."

The Attorney General contends that any error in admitting this challenged evidence was harmless.

The defense theory of the case was that McNary was the person who shot Officer Fontana, but the police did not do everything they could have done during their investigation of the shooting. The evidence that a .357-caliber gun and .357-caliber ammunition unrelated to Officer Fontana's shooting (Officer Fontana was shot with a .45) were found during a search of defendant's residence tended to show that the officers' search of defendant's residence was thorough, and the evidence was not unduly prejudicial to defendant because the .357 gun and ammunition were found in areas of the residence that defendant did not have exclusive control over. The evidence that a resident of Calle Almaden saw defendant in the Hyundai a month before the shooting tended to show that defendant regularly used the Hyundai and that the police were aware that the Hyundai had been seen in the area prior to the shooting, and the evidence was not unduly prejudicial to defendant because there was no evidence that the actions of defendant were the reason the witness reported the prior sighting to the police at the time of the sighting, so any error in admitting the evidence was harmless. The evidence that Martinez was sober, cooperative, and had negative things to say to the police about activity at the Campbell residence was relevant to Martinez's credibility, because Martinez testified that he was uncooperative with the police because the police wanted him to falsely say bad things about defendant, that he did not remember making any statements about Campbell to the police, and that this was because he had a long-standing history of heavy drug and alcohol use. On this record, we cannot say that the trial court's decision to admit the challenged evidence was " 'arbitrary, capricious, or patently absurd' " and " 'resulted in a manifest miscarriage of justice.' " (*Foster*, *supra*, 50 Cal.4th at p. 1329.)

IV. Prosecutorial Misconduct

Defendant contends that the prosecutor committed "a plethora of other acts of misconduct" in addition to the claims he raised above. Specifically, defendant argues that the prosecutor (a) appealed to the jury's sympathy for the victim, (b) misstated the

law during closing argument, (c) disparaged defendant based on his race, (d) engaged in contemptuous behavior, (e) intentionally elicited inadmissible testimony during his cross-examination of defendant, (f) engaged in rude and intemperate behavior, and (g) disparaged defense counsel. "[T]he prosecutor's pervasive misconduct 'so infected the trial with unfairness as to make the resulting conviction a violation of due process.' " Defendant further contends that, in those instances where his counsel failed to object to the misconduct, counsel rendered ineffective assistance.

The Attorney General contends that defendant forfeited many of his claims of misconduct and that, regardless, none of the claimed instances of misconduct were prejudicial.

Recently, in *Fuiava*, *supra*, 53 Cal.4th 622, a case also involving the murder of a peace officer, the California Supreme Court addressed the issue of prosecutorial misconduct. That case provides guidance to us as we address defendant's claims.

" 'Under California law, a prosecutor commits reversible misconduct if he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " [Citation.]' [Citation.]" (*Fuiava*, *supra*, 53 Cal.4th at p. 679; see also *People v. Samayoa* (1997) 15 Cal.4th 795, 841 (*Samayoa*); *People v. Friend* (2009) 47 Cal.4th 1, 29 (*Friend*).) Misconduct need not be intentional before it constitutes reversible error. (*Hill*, *supra*, 17 Cal.4th at p. 822.)

"A defendant generally ' " ' may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' " [Citation.]' [Citation.] A defendant's failure to object and to request an admonition is excused only when 'an objection would have been futile or an admonition ineffective.' [Citation.] Defendant therefore forfeited appellate claims of misconduct related to many of the prosecutor's actions listed in his briefs. [Citation.]" (*Fuiava, supra,* 53 Cal.4th at pp. 679-680; see also *Hill, supra,* 17 Cal.4th at p. 820; *Samayoa, supra,* 15 Cal.4th at p. 841.)

"To determine whether an admonishment would have been effective, we consider the statements in context. [Citation.] If the defendant objected or if an objection would not have cured the harm, we look to see whether the improper conduct was prejudicial, i.e., whether it is reasonably probable that a jury would have reached a more favorable result absent the objectionable comments. [Citation.]" (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1074 (*Herring*).)

" 'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 553-554 (*Brown*); see also *Samayoa, supra,* 15 Cal.4th at p. 841.)

"To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel's performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability

that, but for counsel's errors, the result of the proceeding would have been different." (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 (*Strickland*).) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland, supra,* 466 U.S. at p. 697.)

IV. A. Appeal to Jurors' Sympathy

During closing argument, the prosecutor stated that defendant was charged with the "monstrous crime" of "the killing of a police officer." The prosecutor argued that our society is "dependent upon law enforcement officers who value doing the right thing, who are brave and . . . demonstrate valor daily." He further argued that he had received a note the night before from a police officer friend which said that Officer Fontana "never had a chance . . . to grow old, . . . to have a life, . . . to have the career that he worked for and hoped for. And he didn't have a chance that night on the street." Defendant contends that the prosecutor's arguments "had no bearing on the question of [defendant's] guilt or innocence, but were highly emotive and bore a strong likelihood of inflaming the jury's passions."

"[A]n appeal for sympathy for the victim is out of place during an objective determination of guilt." (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, reversed on another ground in *Stansbury v. California* (1994) 511 U.S. 318.) " 'It is, of course, improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." [Citation.]' [Citation.]" (*People v. Redd* (2010) 48 Cal.4th 691, 742 (*Redd*); *Fuiava, supra,* 53 Cal.4th at p. 693.) However, defendant did not object to this argument by the prosecutor. Therefore, defendant has forfeited the issue on appeal. (*People v. Stansbury, supra,* at p. 1056; *Redd, supra* at p. 743.) Regardless, the prosecutor's first comments merely referred to the special allegation that the victim was a peace officer

engaged in the performance of his duties, and the court instructed the jury that it must "not let bias, sympathy, prejudice, or public opinion influence your decision." Even if we assume that the prosecutor's latter comments constituted misconduct, on the record before us we find that an admonition would have cured any harm and that there is no reasonable probability that a result more favorable to defendant would have been reached in the absence of the assumed misconduct. (*People v. Stansbury*, *supra*, at p. 1057; *Redd*, *supra*, at p. 743; *Herring*, *supra*, 20 Cal.App.4th at p. 1074.)

IV. B. Misstatement of the Law

Defendant contends that the prosecutor misstated the law during closing argument by suggesting that defendant had a responsibility to prove his innocence. " '[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]' " (*Hill*, *supra*, 17 Cal.4th at p. 829.)

"In *Griffin v. California* (1965) 380 U.S.609, the United States Supreme Court held that the prosecution may not comment upon a defendant's failure to testify in his or her own behalf. Its holding does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses. [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339 (*Bradford*); see also *People v. Ratliff* (1986) 41 Cal.3d 675, 691-692 (*Ratliff*).) "A prosecutor may fairly comment on and argue any reasonable inferences from the evidence. [Citation.] Comments on the state of the evidence or on the defense's failure to call logical witnesses, introduce material evidence, or rebut the People's case are generally permissible. [Citation.] However, a prosecutor may not suggest that 'a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.' [Citations.]" (*People v. Woods* (2006) 146 Cal.App.4th 106, 112 (*Woods*).)

The prosecutor argued: "[Defense counsel] has made a point trying to claim that he has no responsibility to provide any evidence or to prove anything. He keeps talking about burden shifting. But that's not the instruction that you've actually gotten from the court. [¶] The defendant's presumed to be innocent. That's the law. It's been . . . always the law in this country. It goes back to England. And that's satisfactory, and no one's challenging that. [¶] I bear the burden of proof to prove him [guilty] beyond a reasonable doubt. That's all we're talking about. What that does not mean is if there's evidence that's available to the defendant . . . that would help prove that he's telling the truth or there's evidence available to the defendant that would help prove that the witnesses he called or that he's relying upon are telling the truth, then he should bring them in. [¶] He has subpoena power. . . . There is no reason that he could not do that . . . . He can't shirk that responsibility, as he tried to do here. And he truly tried to do it. [¶] He says [defendant] is telling the truth. After all, look at all the people he told but failed to bring in those people to prove that that's, in fact, what occurred. [¶] That's not what he claims, that burden shifting, and the law protects him from that accusation. That's not the truth. [¶] Indeed, there were many opportunities – many opportunities –" When the court overruled defense counsel's objection at this point that this argument was "prosecutorial misconduct," the prosecutor continued: "There were many opportunities for Counsel to try and prove that [defendant] was telling the truth. Many. He was the one who was on the run. He was the one who was privy and knew where these witnesses were. He was the one who knew what he told these witnesses." The prosecutor then named several people that could have corroborated defendant's and his witnesses' testimony.

To the extent that the prosecutor's argument could be reasonably understood to suggest that defendant had a "responsibility" to present evidence to prove his innocence, the argument constituted misconduct. However, to the extent that the argument could be reasonably understood to be only a comment on the failure of defendant to present

evidence corroborating his and his witnesses' testimony, the argument did not constitute misconduct. (*Bradford*, *supra*, 15 Cal.4th at pp. 1339-1340; *Woods*, *supra*, 146 Cal.App.4th at p. 113.) We "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. (*Brown*, *supra*, 31 Cal.4th at pp. 553-554.) Further, the court overruled defense counsel's objection that the prosecutor's argument constituted misconduct. The prosecutor argued that he had the burden to prove defendant guilty beyond a reasonable doubt, and that defendant failed to call logical witnesses that would corroborate his claim that McNary was the shooter. The court had previously instructed the jury that the People had the entire burden of establishing defendant's guilt. (CALCRIM No. 220; see *Ratliff*, *supra*, 41 Cal.3d at p. 691; *Redd*, *supra*, 48 Cal.4th at p. 740.) Although the question is close, we conclude on this record that it is reasonably likely that the prosecutor's comments, taken in context and together with the trial court's instructions, were not understood by the jury to mean that defendant had the burden of producing evidence to demonstrate his innocence. (*Bradford*, *supra*, 15 Cal.4th at p. 1339-1340; *Hill*, *supra*, 17 Cal.4th at pp. 831-832; *Redd*, *supra*, at p. 740.) Accordingly, we conclude that the prosecutor did not commit misconduct by misstating the law.

Even assuming we were to find that the prosecutor's comments did constitute misconduct, we would not find them prejudicial. The court instructed the jury that the People had the entire burden of establishing defendant's guilt and the prosecutor admitted that he had the burden to prove defendant guilty beyond a reasonable doubt. Although a criminal defendant is entitled to the presumption of innocence and a prosecutor may not suggest that a defendant has the burden to prove his innocence, a prosecutor may still comment on a defendant's failure to call logical witnesses and failure to introduce material evidence. Here the prosecutor pointed out several witnesses that defendant did not call. Had defendant requested that the court admonish the jury that he did not have a "responsibility" to present evidence to prove his innocence, such an admonition would

have cured any harm caused by the alleged misconduct. Accordingly, it is not reasonably probable that a jury would have reached a more favorable result absent the prosecutor's comments. (*Herring*, *supra*, 20 Cal.App.4th at p. 1074.)

IV. C. Appeal to Racial Prejudice

Defendant contends that the prosecutor "disparaged [him] by not-so-subtly appealing to race prejudice." "A prosecutor may argue vigorously and include opprobrious epithets and forceful language when warranted by the evidence" (*Herring*, *supra*, 20 Cal.App.4th at p. 1074), but may not make comments that have nothing to do with the crimes alleged and that attack the defendant's character or "invite[] the jury to decide the case based on its own value judgment and not on the law." (*Id*. at p. 1075.)

The prosecutor argued that defendant's defense "consists of fear mongering. They put up a booking photograph of Rodney McNary, and they play him as the boogeyman. He's a mean-looking black man, and they're trying to intimidate you with that. And whenever a defense witness is cornered, they resort to the company line again: They're afraid of the boogeyman. [¶] But when you look at these two men, [defendant] and McNary, I suggest to you there's little difference between them. Both of them are violent criminals. Both of them are convicted of multiple felonies. And, according to this evidence, both of them are validated members of Seven Trees Crips."

The prosecutor also argued that defendant had made admissions to various people, and "[t]hen there was also admissions that took different forms. There was the letter. And in the letter he said things. . . . [¶] It's hard to read, and he seems fairly illiterate. But he doesn't seem inarticulate. And that's what . . . I think you should . . . ask yourself when you read the letter, because there's a difference between good grammar and ability to express your thoughts. And there's no question he's not handicapped in the latter. [¶] And when you go through the letter, you sit there and read it aloud, you laugh or you feel dismayed at – at the – I don't know what they call it nowadays. Ebonics? I remember about ten years ago they were calling it that. And some of that stuff . . . is the type of

stuff that people in the 'hood just write that way or speak that way. [¶] But, also, look to see [defendant's] ability to express his thoughts."

Defendant did not object to these arguments by the prosecutor and, absent timely and specific objection, these arguments would not be cause for reversal since a timely admonition likely would have cured any harm. (*Herring*, *supra*, 20 Cal.App.4th at p. 1075.) Moreover, we do not believe that these arguments demonstrate that the prosecutor was inviting the jury to decide the case based on its own value judgment and not on the facts and the law. (*Ibid*.) Accordingly, no prejudicial misconduct has been shown.

IV. D. Contemptuous Conduct

Defendant contends that the prosecutor committed "contemptuous behavior" during April and May 2006, almost three years before defendant's 2009 trial. The parties agree that: on May 30, 2006, defendant's counsel filed a petition alleging the prosecutor's conduct at issue constituted grounds for recusal as well as contempt of court; on June 8, 2006, the court found no basis for recusal, but the court did not rule on the contempt petition; on June 12, 2006, the court informed the parties that it would address the contempt petition at the end of trial; on August 23, 2007, as the trial had not yet begun, the prosecutor brought the outstanding contempt petition to the court's attention, but argued that the statute of limitations had run; during the prosecutor's argument, the court stated, "I'll have to look," "I'll look at it," "Well, I'll take a look at that"; thereafter, it does not appear that any party brought the issue of the outstanding contempt petition to the court's attention again, and the court never addressed the merits of the defense petition.

As the trial court found that the complained-of pretrial conduct by the prosecutor was not grounds for recusal of the prosecutor, which ruling defendant does not contest here, and defendant did not thereafter request the court to find that the prosecutor's conduct constituted a contempt of court, we find that there is nothing for this court to review on appeal from the judgment. (See Code Civ. Proc., § 1222; *Moffat v. Moffat*

(1980) 27 Cal.3d 645, 656 [orders in contempt proceedings are final and conclusive; review may only be had by writ of certiorari or, where appropriate, habeas corpus].)

IV. E. Improper Questioning of Defendant

Defendant contends that the prosecutor twice intentionally elicited inadmissible testimony during his cross-examination of defendant. " 'It is, of course, misconduct for a prosecutor to "intentionally elicit inadmissible testimony." [Citations.]' [Citations.] Such misconduct is exacerbated if the prosecutor continues to attempt to elicit such evidence after defense counsel has objected. [Citation.]" (*Smithey*, *supra*, 20 Cal.4th at p. 960.)

During a recorded telephone conversation that the prosecutor played for the jury, and during defendant's own testimony on cross-examination, defendant said that he did not surrender to the police sooner than he did because he was afraid of the police; because he did not want to have to tell on McNary; and because he was trying to stay out of custody until his daughter's second birthday on November 15, 2001, as he was not present for her first birthday. The prosecutor asked defendant why he was not present for his daughter's first birthday. The court sustained defense counsel's relevance objection. Then the prosecutor asked defendant if he was someplace where he could not visit his daughter on her first birthday. The court again sustained defense counsel's relevance objection. The prosecutor then asked defendant if he was in jail on his daughter's first birthday. After the court sustained the objection defense counsel raised on unspecified grounds, the prosecutor asked defendant if he had promised his daughter that he would be present for her second birthday, and whether he had hoped to visit her then. When defendant answered affirmatively to both questions, the prosecutor then asked defendant whether that was the real reason he did not turn himself in rather than because he was afraid of the police and McNary.

Defense counsel's objections to the prosecutor's questions of defendant were on the ground of relevancy. He did not claim the questions constituted misconduct, and he

did not request an admonition. An admonition would have cured any harm. Accordingly, defendant has forfeited any claim of misconduct on appeal. (*Hill*, *supra*, 17 Cal.4th at p. 820; *Fuiava*, *supra*, 53 Cal.4th at p. 683.) "Moreover, we observe that it is not necessarily improper for an attorney to attempt to overcome prior sustained objections by asking a witness similar questions that have been reframed in an effort to meet the trial court's ruling." (*Fuiava*, *supra*, at p. 683.) In addition, the jury was instructed at the end of the case that the attorneys' questions are not evidence, and that the jury was not to assume that "something is true just because one of the attorneys asked a question that suggested it was true." Therefore, on this record, we cannot say that the prosecutor's questions constituted prejudicial misconduct.

Later during the prosecutor's cross-examination of defendant, he played a recording of a jail-house telephone conversation defendant had had with a friend and defendant's mother. The prosecutor then asked defendant whether in that conversation, by repeating a story his lawyer told him, defendant was saying "that it's good for your case if Jeffrey Fontana is a jerk?" When defendant answered "Yes," the prosecutor asked defendant if he had told his friend and his mother about McNary. Defendant responded, "I didn't say anything." "I just telling her what was told to me." The prosecutor then asked defendant, "Is that because you hadn't come up with the story about [McNary] being the shooter?" Defendant responded "No," and the prosecutor then asked, "Had you told your lawyer at that point about [McNary] being the shooter?" Defense counsel objected, stating that the question called for privileged information. The court overruled the objection, but the prosecutor withdrew the question.

As the prosecutor withdrew the question as soon as defense counsel objected to it, defense counsel did not request an admonition, which would have cured any harm caused by the question, and the jury was instructed that the attorneys' questions are not evidence, we cannot say that the prosecutor's question constituted prejudicial misconduct.

IV. F. Intemperate Behavior

Defendant contends that on eight specified occasions, not all of which were before the jury, the prosecutor engaged in "rude and intemperate behavior" "which cumulatively created an 'acrimonious atmosphere in the courtroom and threaten[ed] the ability of defendant to receive a fair trial.' " " 'It is the duty of every member of the bar to "maintain the respect due to the courts" and to "abstain from all offensive personality." [Citations.] A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state.' " (*Hill, supra,* 17 Cal.4th at pp. 819-820.) " 'Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve. [Citations.]' [Citations.]" (*Id*. at p. 820.)

The incidents of "rude and intemperate behavior" by the prosecutor that defendant challenges are as follows:

(1) Twice before the jury the prosecutor asked Sally Graver, the defense investigator, "argumentative" questions during cross-examination, defense counsel objected to both questions, and the court sustained the objection as to the first question. The first "argumentative" question was, "You are a real investigator, aren't you?" After the court sustained defense counsel's objection, the prosecutor asked Graver, "You are a licensed investigator, aren't you?" The second "argumentative" question occurred after Graver admitted that she was guessing in answer to the prosecutor's question. The prosecutor asked her, "Would reference to the Lucio report refresh your recollection . . . so you wouldn't have to guess?" Graver responded, "We can give it a try." The prosecutor stated, "Well, you know better than I do. Do you think you're capable of remembering what you read?" Graver responded, "If it's written in there, yes." Defense counsel objected, but the objection was overruled.

(2) Twice before the jury the prosecutor asked Mark Harrison, the defense expert on African-American criminal street gangs, "argumentative" questions during cross-examination, defense counsel objected to both questions, and the court sustained the objection as to the first question. The first "argumentative" question occurred when the prosecutor asked Harrison whether Santa Clara County was largely Crip street gang territory in 2000. Harrison responded that he did not know. The prosecutor then asked Harrison where Blood street gangs existed at that time. Harrison responded that "they have not had just one stronghold." The prosecutor then asked, "Sir, you don't know what you're talking about; isn't that true?" After the court sustained defense counsel's objection, the prosecutor asked Harrison, "Isn't it true that Santa Clara County Bloods only existed in one geographic area, and the rest of the county was Crip territory?" Harrison responded that he did not know. The second "argumentative" question occurred when the prosecutor asked Harrison if the Seven Trees Crip gang was "largely defunct and has been for years." Harrison responded, "I don't know that." When the prosecutor stated, "No, you don't, do you?" defense counsel objected. In overruling the objection, the court stated: "Right now the question I hear is: You don't know whether they're ongoing, do you? [¶] I don't see anything objectionable to that question. [¶] The witness needs to answer."

(3) The prosecutor said "Are you kidding?" when defendant testified during cross-examination before the jury that his lawyer had told him that the "head of the San Jose chapter" of the NAACP "was saying . . . that he had gotten phone calls and people would make complaints that the police was riding around and saying that when they catch me, they was going to kill me." Defense counsel objected that there was no question pending, and that it "[s]ounds like an editorial." The prosecutor said, "Let me rephrase it," and the court overruled the objection.

(4) Defense counsel objected during a pretrial hearing that the prosecutor was "badgering" a witness when he repeatedly asked the witness if she recalled the question

he had asked her but that she had not answered. The court overruled the objection. Defense counsel later stated on the record that the prosecutor had reduced the witness to tears.

(5) During the prosecutor's cross-examination of Lacey Ortez before the jury, when Ortez attempted to answer a question before the prosecutor finished asking it, the prosecutor said, "I'm not done." The court immediately stated: "Counsel – counsel gets to – [¶] Let's try and keep our tone civil. This happens in court all the time. There's no reason to get vehement. So finish your question." After the prosecutor finished asking his question, and Ortez answered it, the prosecutor noted that Ortez was crying.

(6) During a January 2006 pretrial hearing, more than three years before trial, the prosecutor interrupted the court on multiple occasions. "He once cut the court off in mid-sentence with the words 'I am not done' . . . and three times ordered it to 'Let me finish.' "

(7) During a January 2007 pretrial hearing, more than two years before trial, defense counsel stated that " 'it was reported to me that [the prosecutor] had a rude, impolite, discourteous encounter with Ms. Graver [the defense investigator], and she was very upset by his treatment of her,' [but] [t]he prosecutor defended his behavior."

(8) During trial, but outside the presence of the jury, defendant's father invoked his Fifth Amendment right to not testify. Defense counsel objected that the prosecutor's questioning of defendant's father on the invocation of his right was "argumentative" and "pejorative." The court sustained the objection on the ground that the prosecutor's question was "argumentative."

Much of the conduct by the prosecutor that defendant challenges here occurred outside the presence of the jury and some of the conduct occurred years before trial. The questioning of defendant's father and the alleged "discourteous encounter" with the defense investigator occurred outside the presence of the jury, and the alleged "badgering" of a witness and the repeated interrupting of the court occurred during

pretrial hearings. Defendant does not explain how any of the conduct that occurred outside the presence of the jury could have infected the trial with such unfairness as to make the resulting conviction a denial of due process. (*Friend*, *supra*, 47 Cal.4th at p. 29.)

Most of the conduct by the prosecutor that occurred in the presence of the jury amounted to allegedly asking "argumentative" or "editorial" questions. Some objections to the questions were overruled by the court. The court overruled one of two allegedly "argumentative" questions asked of the defense investigator, the court overruled one of two allegedly "argumentative" questions asked of the defense expert witness on African-American criminal street gangs, and the court overruled the "editorial" question asked of defendant when the prosecutor stated that he would re phrase the question. As the Supreme Court observed in *Fuiava*: "Even to the extent we might characterize the prosecutor as having overreacted to the difficulties he faced in effectively questioning [certain witnesses], however, it is clear that the trial court monitored the situation and intervened when it felt it necessary to do so." (*Fuiava*, *supra*, 53 Cal.4th at p. 686.)

Counsel must always be respectful and courteous to the court, to other counsel, and to witnesses. Here, the record reflects that the court once had to tell the prosecutor that there was no need for him to use a "vehement" tone of voice with a witness in front of the jury and that the prosecutor rudely and discourteously interrupted the court numerous times at a pretrial hearing. However, the record also reflects that the court intervened when it felt it necessary to do so. Therefore, we cannot say that, on the record before us, the conduct by the prosecutor before the jury that defendant challenges here infected the trial with such unfairness as to make the resulting conviction a denial of due process. (*Friend*, *supra*, 47 Cal.4th at p. 29; *Brown*, *supra*, 31 Cal.4th at pp. 553-554; *Fuiava*, *supra*, 53 Cal.4th at p. 686.)

IV. G. Disparagement of Defense Counsel

Defendant contends that on three occasions, only two of which were in the presence of the jury, the prosecutor disparaged defense counsel, which "gratuitously added to the acrimonious nature of the proceedings." "A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. [Citations.] 'An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable.' [Citation.]" (*Hill*, *supra*, 17 Cal.4th at p. 832; *Redd*, *supra*, 48 Cal.4th at p. 734.) However, the prosecutor " 'has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account. [Citations.]' [Citation.]" (*Redd*, *supra*, at p. 735.)

The conduct by the prosecutor that defendant challenges here is as follows:

(1) During closing argument, the prosecutor, while talking about his dog Lydia, stated that "the way she would deal with her world was through looking away and ignoring what she thought was going to be uncomfortable. . . . [¶] . . . If there was something unpleasant, she would just look away. And as far as she was concerned, it didn't really exist. And it worked well, because she . . . lived to be a ripe old age eventually. [¶] And this is the part that I'm – I – I don't mean to disparage Counsel. I don't mean to disparage you, but you remind me of Lydia. Because what you've done is you take instances, you ignore things, and you suggest to the jury, then, that this creates a reasonable doubt. And it doesn't. It doesn't." Defense counsel did not object to this argument.

(2) During the trial, defense counsel wanted to distribute to the jury copies of the transcript of a CD they were about to hear when the courtroom clerk was out of the courtroom. The prosecutor complained that defense counsel was not following proper procedure, so the court told defense counsel that he could ask the court "to mark it and admit it, and then the actual marking and admitting will happen when the clerk gets

back." The prosecutor complained that, "Now you're telling him how to do it." "He needs to learn to walk by himself." The court responded: "Well, we can worry about parenting skills another time. For right now, go ahead. You can proceed." Defense counsel then asked that the CD and transcripts be marked and that the CD be admitted into evidence.

(3) During a pretrial hearing, several years before trial, when defense counsel requested that the prosecutor be admonished for disparaging defense counsel, the prosecutor admitted that he had disparaged defense counsel during the hearing. Defendant acknowledges on appeal that the court then issued a "mild admonition directed at both parties, without making any explicit finding of disparagement or prosecutorial misconduct."

As defendant did not object below to the prosecutor's argument and comments before the jury that he challenges here, and an admonishment would have cured any harm, we find that defendant has forfeited his claims. (*Hill, supra*, 17 Cal.4th at p. 820.) Even if we were to find no forfeiture, we are satisfied there was no denial of due process. The court admonished both counsel after the prosecutor's remarks at the pretrial hearing without making an explicit finding of disparagement or misconduct. Defense counsel did not object to the prosecutor's comments before the jury, which on occasion were rude and intemperate, and they did not comprise a pattern of egregious behavior making the trial fundamentally unfair because they related to the tactics and argument of counsel rather than to defendant's culpability. (*Samayoa, supra*, 15 Cal.4th at p. 841; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

We also agree with our Supreme Court's assessment of a similar claim of cumulative prejudice in *Fuiava*. "To the extent we have concluded (or have assumed for the sake of argument) that defendant has preserved some of his claims of misconduct, and have concluded (or assumed) that, with regard to the preserved claims, misconduct occurred, we also have concluded that the misconduct could not have been prejudicial.

Defendant's arguments concerning the relative strengths and weaknesses of the prosecution and defense cases do not convince us that the preserved instances of misconduct or assumed misconduct, when considered individually or cumulatively, deprived defendant of a fair trial." (*Fuiava, supra,* 53 Cal.4th at p. 692.)

V. A. Evidence and Argument Regarding the Conduct of Defendant's Father

Defendant contends that evidence that defendant's father lied to police regarding the ownership status of his Hyundai on the morning of Officer Fontana's shooting, and that he was otherwise uncooperative, was improperly admitted as irrelevant and prejudicial, because there was no evidence that defendant asked his father to lie. He further contends that the prosecutor improperly argued to the jury that defendant's father lied to the police about the ownership status of the Hyundai in order to protect defendant, that the lie was part of a larger conspiracy to falsely exculpate defendant, and that the jury could consider the evidence as establishing defendant's consciousness of guilt. Defendant acknowledges that defense counsel did not object to the admission of the evidence or the prosecutor's argument, but he argues that his contentions are cognizable on appeal because counsel rendered ineffective assistance by failing to object. He further argues that this court should find the admission of the evidence and the prosecutor's argument prejudicial error.

The Attorney General contends that the evidence was properly admitted, so there was neither prejudicial error nor ineffective assistance of counsel.

"California law prohibits proving consciousness of guilt by establishing attempts to suppress evidence unless those attempts can be connected to a defendant. (*People v. Hannon* (1977) 19 Cal.3d 588, 596-600; *People v. Weiss* (1958) 50 Cal.2d 535, 551-554.)" (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.) "Consciousness of guilt may be shown by (1) a defendant's own efforts to create false evidence or obtain false testimony, or (2) the efforts of someone else to do so, 'but only if the defendant was present and knew about the conduct, or, if not present, authorized the other person's

actions.' (CALCRIM No. 371.)" (*People v. Nelson* (2011) 51 Cal.4th 198, 214, fn. 9.) "Whether or not any given set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a defendant is a question of law." (*People v. Hannon, supra,* 19 Cal.3d at p. 597.)

In this case, there was evidence in the record which, if believed by the jury, sufficiently supported the prosecutor's argument that defendant authorized his father's actions. Defendant went to Tyree Washington's apartment a second time on the morning of Officer Fontana's shooting. Defendant was out of breath, and he asked to use the phone. Washington asked defendant what was going on and defendant said, "it's nasty, it's real ugly." Washington gave defendant a phone and defendant made three or four calls. In one conversation, which Washington thought was with defendant's father, defendant said something like, "clean up the house." A call was made from Washington's phone to defendant's father at 4:36 a.m., and another call was placed from Washington's phone to defendant's brother's girlfriend at 4:38 a.m. Defendant also called Marcell Quincy Gilbert at 4:46 a.m., and gave him directions to Washington's apartment. When Gilbert arrived at Washington's apartment to give defendant a ride, he asked defendant, "What's going on?" Defendant replied, "It's all bad." Defendant climbed into the open bed of Gilbert's pickup truck and lay down. Gilbert took defendant to Gilbert's home, gave defendant his cell phone, and went to bed. Defendant's father talked to the police around 6:00 a.m. The jury could reasonably infer from this evidence that, during telephone conversations with his father and his brother's girlfriend prior to his father's police interview, defendant could have asked that his father help him suppress evidence tending to show defendant's guilt. Accordingly, the court properly admitted testimony showing that defendant's father lied to the police and properly permitted the prosecutor to argue that defendant's father's action could support a finding of defendant's consciousness of guilt, and defendant cannot show that he was prejudiced by counsel's

failure to raise objections to the evidence and argument because there was strong evidence tending to show that defendant asked his father to help him suppress evidence. (*Strickland*, *supra*, 466 U.S. at p. 697.)

V.B. Janee Gilmore's Testimony

The prosecutor called Janee Gilmore to testify during its case-in-chief over defense counsel's objection. The prosecutor argued that defendant's father was the person who brought Gilmore to defense counsel's attention, and that the prosecution should be able to connect Gilmore with defendant's attempts to blame somebody else for Officer Fontana's shooting. Gilmore testified during the prosecution's case-in-chief that a month or two after Officer Fontana's death, McNary confessed to her that he did the shooting. However, she did not want to tell anybody about the confession, or testify about it, because McNary threatened her and people she cares about, and she was afraid of him and his "people." She was testifying about the confession only because, if she did not do so, "you guys would put me in jail." Gilmore further testified that she and her brother grew up together with defendant, that defendant and her brother were best friends, and that she considered defendant to be like a big brother to her.

Defendant contends that "Gilmore's testimony had no relevance to the prosecution's case-in-chief, and the defense was prejudiced by its admission." He argues that the evidence that defendant spoke to his father after Officer Fontana's shooting, and that defendant's father brought Gilmore to defense counsel's attention, was not sufficient evidence from which the jury could infer that Gilmore was part of a conspiracy to fabricate testimony on defendant's behalf. He further argues that the issue is cognizable on appeal despite defense counsel's failure to object to Gilmore's testimony on this ground, as counsel rendered ineffective assistance by failing to do so.

We find defendant cannot show that he was prejudiced by the admission of Gilmore's testimony during the prosecution's case-in-chief. Gilmore's testimony supported defendant's claim that McNary was the person who shot Officer Fontana, and

defense counsel told the jury during his opening statement that Gilmore would so testify. As we stated above, in section II, the court properly allowed the prosecutor to call Gilmore during its case-in-chief. Accordingly, defendant cannot show that, had counsel raised an additional objection to the prosecutor's calling of Gilmore during its case-in-chief, it is reasonably probable a result more favorable to defendant would have occurred. (*Strickland*, *supra*, 466 U.S. at p. 697.)

V. C. CALCRIM No. 371

The court instructed the jury with a modified version of CALCRIM No. 371, in part, as follows: "If someone other than the defendant tried to provide false testimony or destroy evidence, that conduct may show that the defendant was aware of his guilt but only if the defendant was present and knew about the conduct or, if not present, authorized the other person's actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself." Defendant did not object below to the giving of this instruction. Defendant contends on appeal that the giving of the instruction was reversible error because, "[w]hile there was admittedly evidence that [he] authorized Gerald Kissoon's destruction of the gun used to shoot Officer Fontana, there was zero evidence that [he] authorized or knew about any attempt to *provide false testimony*."

We have found that there was evidence from which the jury could infer that defendant asked that his father help him suppress evidence tending to show defendant's guilt. We also find that there was evidence from which the jury could also reasonably infer that defendant asked his father's help in providing false testimony. In addition, even if we were to find that such an inference was not reasonable based on the evidence, we would find that defendant was not prejudiced by the court's instruction with the modified version of CALCRIM No. 371. The court also instructed the jury that "[s]ome of these instructions may not apply depending on your findings about the facts of the case. Do not assume, just because I give a particular instruction, that I am suggesting

anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." As we must presume that the jury understood and followed this instruction (*Mickey*, *supra*, 54 Cal.3d at p. 689, fn. 17), we must presume that the jury disregarded the part of CALCRIM No. 371 that defendant objects to here if it found that defendant did not authorize any attempt to provide false testimony. No prejudicial error has been shown.

VI. Admission of Multiple Hearsay

Louella Kissoon testified that she spoke with defendant at Priscilla Smith's house a few days after Officer Fontana's shooting. During Louella's testimony, the prosecutor played a recording of her police interview for the jury. During the interview, Louella stated that Smith called her on November 3, 2001, and said "[t]hat Deshawn Campbell had, you know, did the situation that happened, and- [¶] . . . [¶] . . . you know, shot the officer. And whatever, and he was like on the run or something. And I was like, oh!" Prior to the playing of the recording, defense counsel objected that this statement by Louella was "hearsay, blatant hearsay." "It's not used for any purpose of what this witness did next. It should be excluded." The prosecutor argued that "it comes in for her knowledge" because later in the same interview she said that when she saw defendant she told him that she had heard what had happened, that he had killed a police officer, and that she said, "you know you made a mistake, right?" Defendant responded to her, "I know—I fucked up!" The court ruled: "If this were standing alone, I wouldn't allow it. As it relates to the subsequent statement of the witness, I am going to allow it. But I will give a limiting instruction as to that portion."

During the playing of the recording, defense counsel stopped the recording and asked for the limiting instruction as to the statement "You know, shot the officer." The court instructed the jury: "With respect to the last statement that you heard, it's not being offered for the truth of what was asserted in that statement, but for the knowledge that it imparted or attributed – that could be attributed to the maker of the statement, the

witness, or the declarant." Defense counsel thanked the court, and the remainder of the recording was then played.

Defendant now contends that the court erred in playing that portion of Louella's police interview that includes Smith's hearsay statement for three reasons. First, "it was not the accusation itself that was evidence, but rather [defendant's] purported response. The basis in rumor or fact of [Louella's] accusation, assuming she made any such accusation, was accordingly irrelevant." Second, "Smith's statement to [Louella] itself lacked a knowledge foundation." And third, "the trial court's limiting instruction was confusing and erroneous." Defendant argues that the error in admitting the hearsay statement "may not suffice, standing alone, to demonstrate a miscarriage of justice such that a new trial must be ordered, but it hurt [defendant]. . . . [It] could *only* have been prejudicial."

The Attorney General contends that the tape of Louella's entire interview was properly played for the jury. "Louella's reference to Smith's hearsay comments were brief and general, and the jury was instructed that the comments served only to give context to Louella's later interaction with [defendant]. In any event, the evidence as a whole rendered any error harmless."

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) "An out-of-court statement is properly admitted if a nonhearsay purpose for admitting the statement is identified, and the nonhearsay purpose is relevant to an issue in dispute. [Citations.]" (*People v. Turner* (1994) 8 Cal.4th 137, 189; see also *People v. Fields* (1998) 61 Cal.App.4th 1063, 1068.) " '[O]ne important category of nonhearsay evidence . . . [is] evidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer's reaction to the statement that is the

relevant fact sought to be proved, not the truth of the matter asserted in the statement.' [Citation.]" (*People v. Scalzi* (1981) 126 Cal.App.3d 901, 907; see also *People v. Hill* (1992) 3 Cal.4th 959, 987-988; *People v. Mendoza* (2007) 42 Cal.4th 686, 697 (*Mendoza*).)

Here, Louella told the police that, after Smith told her that defendant had killed a police officer, Louella had a conversation with defendant during which she told him that she had heard that he had killed a police officer and did he understand that he had made a mistake. There is no dispute that defendant was aware that there were accusations that he had killed a police officer before he talked to Louella. On this record, the evidence that Smith told Louella that defendant had killed a police officer did not constitute hearsay, as it was not offered to prove the fact of the matter asserted but was offered to show why Louella told defendant that she had heard what had happened (*Mendoza, supra*, 42 Cal.4th at p. 697), and it was not prejudicial to defendant because defendant was aware that others had also made accusations that defendant had killed a police officer at the time Louella spoke to defendant. Accordingly, we cannot say that the court erred in playing the entire recording of Louella's police interview for the jury.

VII. Cumulative Prejudice

Defendant contends that "a confluence of trial errors 'created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors.' " The California Supreme Court has recognized that the cumulative impact of errors at trial may result in the deprivation of a fair trial, even though the errors individually or even added together may not. (See e.g., *Hill, supra*, 17 Cal.4th at p. 847.) For the most part, we have rejected defendant's claims of error. However, even assuming that the court erred in excluding some additional defense evidence and further assuming that there was some prosecutorial misconduct during argument, upon careful consideration, we conclude that there was no miscarriage of justice under the state Constitution (Cal. Const., art. VI, § 13) and that defendant was

not denied due process or a fair trial under the federal Constitution. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1056; *Fuiava*, *supra*, 53 Cal.4th at p. 733.) "Defendant was entitled to a fair trial but not a perfect one. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

VIII. Custody Credits

Defendant contends that the 483 days of presentence custody credits he earned in the burglary case (case No. C9946256) prior to the resentencing in that case on August 7, 2009, should have been carried forward to the current abstract of judgment. Therefore, he requests that this court order the abstract of judgment modified to include those credits. After reviewing defendant's claim, the Attorney General "see[s] no basis to oppose it." Accordingly, we will order the abstract of judgment modified by adding 483 days of presentence custody credits in case No. CC9946256.

DISPOSITION

The judgment is affirmed. The clerk of the superior court is directed to amend the abstract of judgment to include 483 days of presentence custody credits in case No. CC9946256, and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

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BAMATTRE-MANOUKIAN, ACTING P. J.

WE CONCUR:

_____

MIHARA, J.

_____

WALSH, J.*

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*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.